

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1.  
DESCRIPTION AND CLASSIFICATION/(1) GENERAL DESCRIPTION/1. Meaning of 'choses in action'.

## CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)

### 1. DESCRIPTION AND CLASSIFICATION

#### (1) GENERAL DESCRIPTION

##### 1. Meaning of 'choses in action'.

The expression 'choses in action' or 'thing in action'<sup>1</sup> in the literal sense means a thing recoverable by action<sup>2</sup>, as contrasted with a chose in possession, which is a thing of which a person may have physical possession. The meaning of the expression 'choses in action' or 'thing in action' has expanded over time<sup>3</sup>, and is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession<sup>4</sup>. By virtue of the definition of 'property' in the Theft Act 1968<sup>5</sup>, a thing in action is capable of being the subject matter of a theft<sup>6</sup>, and by virtue of the definition of 'property' in the Law of Property (Miscellaneous Provisions) Act 1994<sup>7</sup>, a thing in action is subject to the covenants for title to be implied on a disposition of property under that Act<sup>8</sup>. It has, however, been held that the tort of conversion does not apply to a chose in action<sup>9</sup>. A chose in action is no less a chose in action because it is not immediately recoverable by action, such as a debt payable in the future<sup>10</sup>. Though the existence of a remedy or remedies is an essential condition for the existence of a chose in action, the remedies are not property in themselves, capable of assignment separately from the chose<sup>11</sup>.

1 'Thing in action' is the term more commonly employed in modern statutes: see eg the Proceeds of Crime Act 2002 s 84(1); and **SENTENCING AND DISPOSITION OF OFFENDERS** vol 92 (2010) PARA 391; the Fraud Act 2006 s 13(3); *Kensington International Ltd v Republic of Congo* [2007] EWCA Civ 1128, [2008] 1 All ER (Comm) 934; and **CRIMINAL LAW, EVIDENCE AND PROCEDURE**; the Insolvency Act 1986 ss 144(1), 311(4), 436; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 398, 400; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARAS 489, 491; the Law of Property Act 1925 s 136(1); and PARA 72; the Trustee Act 1925 s 51; and **TRUSTS** vol 48 (2007 Reissue) PARA 884 et seq. 'Choses in action' has been preferred, however, as recently as the Forfeiture Act 1982 s 2(8), though it was referred to as 'antiquated Franglais' in *R v Hallam and Blackburn* [1995] Crim LR 323, CA.

2 Ie, in the case of a thing recoverable by civil proceedings to which the Civil Procedure Rules 1998, SI 1998/3132 ('the CPR') apply, recoverable by issuing a claim: see **CIVIL PROCEDURE** vol 11 (2009) PARA 18. Note that under the CPR, an 'action' is now known as a 'claim': see **CIVIL PROCEDURE** vol 11 (2009) PARA 18.

For definitions of 'choses in action' in the old writers see *Termes de la Ley*, sv Chose in Action; 2 Bl Com 389, 396; Blount's Law Dictionary, sv Chose in Action; Shep Touch 231, 430; Jacob's Law Dictionary; Bro Abr, Chose in Action; Co Litt 120a, 213a, 292b, 351. The expression is found in the history of English law with so many meanings attached to it, and has been and still is employed to denote so many and such various classes of things, that it is impossible to give an accurate and complete definition of what it means and may include at the present day. The various kinds of property included under the term have little in common beyond the characteristic fact of their not being subjects of actual physical possession. For an enumeration of choses in action see PARA 5 et seq. See also *R v Kohn* (1979) 69 Cr App Rep 395 at 404, CA, per Geoffrey Lane LJ, citing this paragraph in the previous edition of this title.

3 The phrase seems once to have been used as almost equivalent to a right of action: see Shep Touch 231, 430; Bro Abr, Chose in Action pl 8; Co Litt 292b. Compare the old classification of choses in action into real, personal, and mixed: see PARA 3 note 1.

4 *Torkington v Magee* [1902] 2 KB 427 at 430, DC, per Channell J (revsd on another point [1903] 1 KB 644, CA); *Colonial Bank v Whinney* (1886) 11 App Cas 426 at 440, HL; and see Crossley Vaines on Personal Property (5th Edn) 262-263. There are, however, certain subjects of property usually claimed as choses in action which are not in fact recoverable by action, and which are therefore not strictly choses in action, eg debts due on foreign bonds (*Re Huggins, ex p Huggins* (1882) 21 ChD 85 at 90-91, CA; *Picker v London and County Banking Co* (1887) 18 QBD 515 at 519, CA) and pay and pensions of the armed forces (see PARA 92 note 1).

'Chose in action' includes in some writers mere symbols of property, eg a bond (Co Litt 120a, 232; Tomlin's Law Dictionary, sv Assignment) or a bill of exchange (*Ryall v Rowles* (1750) 1 Ves Sen 348, and notes to that case in 1 White & Tud LC (9th Edn) 97 et seq; *Master v Miller* (1791) 4 Term Rep 320 at 340; affd (1893) 5 Term Rep 367). It includes some forms of property of which no manual possession is possible, eg shares in a joint stock company: *Colonial Bank v Whinney* (1886) 11 App Cas 426 at 440, HL. A shareholder's right to obtain payment of his proportion of a declared dividend is a debt, and therefore a separate chose in action: *Dalton v Midland Counties Rly Co* (1853) 13 CB 474 at 478; *Re Severn and Wye and Severn Bridge Rly Co* [1896] 1 Ch 559. Proceeds of a sale made by order of the Prize Court were held to be a chose in action in *Allgemeine Versicherungs-Gesellschaft Helvetia v German Property Administrator* [1931] 1 KB 672, CA: see PARA 92 note 4.

5 le in the Theft Act 1968 s 4(1): see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(1) (2006 Reissue) PARA 285.

6 *R v Kohn* (1979) 69 Cr App Rep 395, CA; *R v Thompson* [1984] 3 All ER 565, [1984] 1 WLR 962, CA; *A-G's Reference (No 1 of 1983)* [1985] QB 182, [1984] 3 All ER 369, CA; *R v Navvabi* [1986] 3 All ER 102, [1986] 1 WLR 1311, CA; *Chan Man-sin v A-G of Hong Kong* [1988] 1 All ER 1, [1988] 1 WLR 196, PC; *R v Wille* (1987) 86 Cr App Rep 296, CA; *R v Hilton* [1997] 2 Cr App Rep 445, 161 JP 459, CA; *R v Williams* [2001] 1 Cr App Rep 362, [2000] All ER (D) 1393, CA; *A-G's Reference (No 4 of 1979)* [1981] 1 All ER 1193, [1981] 1 WLR 667, CA (as to handling a stolen thing in action). See also *A-G of Hong Kong v Nai-Keung* [1987] 1 WLR 1339, PC; *R v Shadrokh-Cigari* [1988] Crim LR 465, CA; *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC; *R v Adams* [2003] EWCA Crim 3620, [2004] All ER (D) 205 (Apr).

7 Law of Property (Miscellaneous Provisions) Act 1994 s 1(4).

8 See the Law of Property (Miscellaneous Provisions) Act 1994 Pt I (ss 1-13); and **SALE OF LAND** vol 42 (Reissue) PARA 349 et seq.

9 *OBG Ltd v Allan, Douglas v Hello! Ltd (No 3), Mainstream Properties Ltd v Young* [2007] UKHL 21, [2008] 1 AC 1, [2008] 1 All ER (Comm) 1.

10 *Kwok Chi Leung Karl v Comr of Estate Duty* [1988] 1 WLR 1035, PC.

11 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 117, [1998] 1 WLR 896 at 915, HL, per Lord Hoffman.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(1) GENERAL DESCRIPTION/2. Locality of chose in action.

## **2. Locality of chose in action.**

A chose or thing in action, being in effect a mere right to recover by action, has no actual local existence<sup>1</sup>, but a locality is attributed to it. The rules governing the locality of choses in action for the purposes of private international law and the conflict of laws are discussed elsewhere in this work<sup>2</sup>.

1 *Lee v Abdy* (1886) 17 QBD 309 at 311-312; *Stamps Comr v Hope* [1891] AC 476 at 481, PC; *Trustee Executors and Agency Co Ltd v IRC* [1973] Ch 254 at 259, [1973] 1 All ER 563 at 565.

2 See **CONFLICT OF LAWS** vol 8(3) (Reissue) PARA 385 et seq.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(i) In general/3. Classification as legal or equitable choses in action.

## **(2) CLASSIFICATION**

### **(i) In general**

#### **3. Classification as legal or equitable choses in action.**

Choses or things in action have been variously classified, sometimes according to the incidents of the rights or property concerned<sup>1</sup>, at other times according to their assignability<sup>2</sup>, and yet again according to the mode of procedure necessary for reducing them into possession. By the classification according to the procedure for reduction into possession, choses or things in action are divided into: (1) legal choses in action; and (2) equitable choses in action. This classification is not wholly satisfactory because it neither embraces all choses in action nor carries with it a sufficiently clear indication as to what choses in action are thereby denoted.

Legal choses or things in action<sup>3</sup> are those which formerly<sup>4</sup> could be recovered or enforced by action at law, for instance, a debt, a bill of exchange, or a claim on a policy of insurance<sup>5</sup>, or which are created by statute and can be legally owned<sup>6</sup>.

Equitable choses in action are those which were enforceable only by what was formerly called a suit in equity, though they may be enforced at the present time in any division of the High Court or in a county court<sup>7</sup>. Equitable choses in action arise out of those kinds of property and rights in respect of which the Court of Chancery formerly had exclusive or peculiar jurisdiction, such as a share or interest in a partnership<sup>8</sup>, an interest in trust funds<sup>9</sup>, a legacy<sup>10</sup>, or a reversionary interest under a will<sup>11</sup>. The right of a mortgagor to any surplus proceeds of sale<sup>12</sup> upon the exercise by the mortgagee of his statutory power of sale<sup>13</sup> amounts to a chose in action and probably to an equitable chose in action<sup>14</sup>.

1 The division of choses in action into personal, real, and mixed, according to whether they arose out of personal rights or obligations (eg debt) or out of real rights and obligations (eg rights and titles to land either of entry or of action), or out of a combination of both (eg wardship), was recognised as early as 1541: see Bro Abr, Chose in Action; Sheppard's Abridgment, sv Chose in Action; *Colonial Bank v Whinney* (1885) 30 ChD 261 at 285, CA.

2 Before the coming into operation of the Supreme Court of Judicature Act 1873 s 25(6) (repealed; see now the Law of Property Act 1925 s 136; and PARAS 72-75), choses in action were divided into: (1) those assignable at common law (see PARAS 16-17); (2) those assignable in equity only (see PARA 24 et seq); (3) those assignable by particular statutes (see PARA 18 et seq); (4) those not assignable at all (see PARA 92 et seq).

3 In the Supreme Court of Judicature Act 1873 s 25(6), the expression 'legal chose in action' was employed with a special and peculiar meaning. That provision was repealed by the Law of Property Act 1925 and re-enacted by s 136 of that Act (subsequently amended) (see PARAS 72-75), the phrase 'legal thing in action' being used.

4 Ie before the coming into operation of the Supreme Court of Judicature Act 1873.

5 See PARA 17.

6 Eg shares in a company governed by the companies legislation: see *Humble v Mitchell* (1839) 11 Ad & El 205; *Colonial Bank v Whinney* (1886) 11 App Cas 426, HL; Pennington's Company Law (8th Edn) 65-67. See also *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA; *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075. Cf *Wm Cory & Son Ltd v IRC* [1965] AC 1088, [1965] 1 All ER 917, HL.

7 As to the concurrent administration of law and equity see the Supreme Court Act 1981 s 49; and **CIVIL PROCEDURE** vol 11 (2009) PARA 533; **CIVIL PROCEDURE** vol 12 (2009) PARA 1702. As to county court jurisdiction see the County Courts Act 1984 s 23; and **COURTS** vol 10 (Reissue) PARA 719; **CIVIL PROCEDURE** vol 11 (2009) PARA 58.

8 *Re Bainbridge, ex p Fletcher*(1878) 8 ChD 218.

9 *Pigott v Stewart* [1875] WN 69.

10 *Deeks v Strutt* (1794) 5 Term Rep 690; *Jennings v Bond* (1845) 8 IR Eq 755.

11 *Re Tritton, ex p Singleton* (1889) 61 LT 301.

12 See the Law of Property Act 1925 s 105; the Land Registration Act 2002 s 54; and **MORTGAGE** vol 77 (2010) PARA 472.

13 le his power of sale by virtue of the Law of Property Act 1925 s 101: see **MORTGAGE** vol 77 (2010) PARA 443.

14 *Bucknell v Bucknell* [1969] 2 All ER 998, [1969] 1 WLR 1204.

## **UPDATE**

### **3 Classification as legal or equitable choses in action**

NOTE 7--Supreme Court Act 1981 now cited as Senior Courts Act 1981: Constitutional Reform Act 2005 Sch 11 para 1 (in force 1 October 2009: SI 2009/1604).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(i) In general/4. Other methods of classification.

#### **4. Other methods of classification.**

Choses in action have been otherwise variously classified. They may be classified under the following heads, which are not mutually exclusive:

- 1 (1) debts<sup>1</sup>;
- 2 (2) rights under a contract<sup>2</sup>;
- 3 (3) rights or causes of action<sup>3</sup>;
- 4 (4) shares<sup>4</sup>;
- 5 (5) intellectual property<sup>5</sup>;
- 6 (6) equitable rights<sup>6</sup>; and
- 7 (7) leases over land<sup>7</sup>.

Leases over land are, however, also classified as a form of real property<sup>8</sup>.

1 See PARA 5.

2 See PARA 6.

3 See PARA 7.

4 See PARA 8.

5 See PARA 9.

6 See PARA 10.

7 See PARA 11.

8 See the Law of Property Act 1925 s 1(1)(b); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 2.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/5. Debts.

## (ii) Enumeration of Choses in Action

### 5. Debts.

Debts have been held to be choses in action<sup>1</sup>, whether due by specialty or by simple contract, whether or not disputed by the debtor<sup>2</sup>, and whether debts of record, including future book debts<sup>3</sup>, or judgment debts<sup>4</sup>, including a judgment for costs which have been assessed but of which the amount has not been entered on the record<sup>5</sup>. Debts due but not payable until a future time are choses in action<sup>6</sup>. Other examples of debts which have been held to be choses in action are:

- 8 (1) mortgage debts<sup>7</sup>;
- 9 (2) contractual rights to present or future payments<sup>8</sup>;
- 10 (3) money in building society or savings bank accounts<sup>9</sup>;
- 11 (4) both a credit balance and a debit balance on a bank account and, where overdraft facilities have been agreed, the right to draw against those facilities within the limits agreed<sup>10</sup>;
- 12 (5) debentures of various kinds<sup>11</sup>;
- 13 (6) dividends on bank stock<sup>12</sup>;
- 14 (7) dividends on a share in a company<sup>13</sup>;
- 15 (8) dividends declared in a bankruptcy<sup>14</sup>;
- 16 (9) a right to rent<sup>15</sup>;
- 17 (10) annuities<sup>16</sup> including an annuity due under a covenant<sup>17</sup> but not an annuity for years charged on leaseholds<sup>18</sup>;
- 18 (11) a fund payable out of the Exchequer for public services<sup>19</sup>;
- 19 (12) negotiable instruments<sup>20</sup> including bills of exchange, promissory notes, and cheques<sup>21</sup>;
- 20 (13) a banker's confirmed credit or guarantee<sup>22</sup>; and
- 21 (14) money earned but not yet payable under a building contract<sup>23</sup>.

Fees owing to a self-employed barrister instructed by a solicitor are not normally 'debts' as no contract is ordinarily made<sup>24</sup>, although there is no longer any rule of law or of professional conduct which prevents a barrister from entering into a contract for the provision of his services as a barrister<sup>25</sup>. Money paid into court under the procedure for offers to settle which applied before 1 April 2007<sup>26</sup> did not give rise to a 'debt' or chose in action in the accepted sense of the expression<sup>27</sup>.

1 YB 37 Hen 6 fo 13; Co Litt 292b; Bro Abr, Chose in Action; *Brice v Bannister*(1878) 3 QBD 569 at 573, CA; *Buck v Robson*(1878) 3 QBD 686; *Walker v Bradford Old Bank Ltd*(1884) 12 QBD 511 at 516; *Agricultural Mortgage Corp Ltd v IRC* [1978] Ch 72, [1978] 1 All ER 248, CA; *Catlin v Cyprus Finance Corp (London) Ltd* [1983] QB 759, [1983] 1 All ER 809 (debt owed by bank to customer). As to liability under a clearing house system see *British Eagle International Airlines Ltd v Cie Nationale Air France* [1975] 2 All ER 390, [1975] 1 WLR 758, HL; *Carreras Rothmans Ltd v Freeman Matthews Treasure Ltd*[1985] Ch 207, [1985] 1 All ER 155.

2 *Camdex International Ltd v Bank of Zambia*[1998] QB 22, [1996] 3 All ER 431, CA.

3 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 533, HL. As to assignments of book debts see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 676; and as to applications under the

Insolvency Act 1986 s 344 for registration of the assignment of book debts see *Practice Direction--Alternative Procedure for Claims* PD8 paras 15B.1-15B.6.

4 *Legal Services Commission v Banks* [2008] EWHC 1035 (QB), [2008] All ER (D) 171 (May).

5 *Hambleton v Brown* [1917] 2 KB 93. See also PARA 74 text and note 3.

6 *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA.

7 *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231 at 254, CA, per Stirling LJ.

8 *Yuill v Fletcher (Inspector of Taxes)* [1984] STC 401 at 407, CA, per Oliver LJ.

9 *R v Marland, R v Jones* (1985) 82 Cr App Rep 134, CA.

10 *R v Golechha* [1989] 3 All ER 908, [1989] 1 WLR 1050, CA. In relation to head (4) in the text, a credit balance is a chose in action belonging to the customer; a debit balance is a chose in action belonging to the bank: *R v Kohn* (1979) 69 Cr App Rep 395, CA; *Alcom Ltd v Republic of Columbia* [1984] AC 580 at 586, [1984] 1 All ER 1 at 4, CA, per Donaldson MR (on appeal [1984] AC 580 at 602, [1984] 2 All ER 6 at 11, HL, per Lord Diplock); *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75, [1986] 1 WLR 1072, PC; *Chan Man-sin v A-G of Hong Kong* [1988] 1 All ER 1, [1988] 1 WLR 196, PC; *R v Governor of Pentonville Prison, ex p Osman* [1989] 3 All ER 701, [1990] 1 WLR 277, DC; *R v McHugh* (1988) 88 Cr App Rep 385, CA; *Re K* (1989) Times, 15 July, QBD; *R v Preddy, R v Slade, R v Dhillon* [1996] AC 815, [1996] 3 All ER 481, HL; *R v Forsyth* [1997] 2 Cr App Rep 299, CA; *Re Bank of Credit and Commerce SA (No 8)* [1998] AC 214, [1997] 4 All ER 568, HL; *R v Williams* [2001] 1 Cr App Rep 362, [2000] All ER (D) 1393, CA. As to the case where money deposited with a bank includes profits made by the depositor by the use of money in which the depositor had no legal title or equitable right see *Trustee of the property of FC Jones (a firm) v Jones* [1997] Ch 159, [1996] 4 All ER 721, CA. Where a trustee mixes money in his own bank account with trust moneys, the moneys in the account belong to the trustee personally and to the beneficiaries under the trust rateably according to the amounts respectively provided. Immediately before the improper mixture the trustee had a chose in action being his right against the bank to demand a payment of the credit balance on his account; immediately after the mixture the trustee had the same chose in action (ie the right of action against the bank) but its value reflected in part the amount of the beneficiaries' moneys wrongly paid in: *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL.

11 *Re Northern Assam Tea Co, ex p Universal Life Assurance Co* (1870) LR 10 Eq 458 at 463; *Re Pryce, ex p Rensburg* (1877) 4 ChD 685 at 688; *A-G v London and India Docks Co* (1906) 95 LT 536 at 539 per Walton J (affd (1907) 98 LT 655, CA; and sub nom *London and India Docks Co v A-G* [1909] AC 7, HL).

12 *McCarthy v Goold* (1810) 1 Ball & B 387.

13 *Dalton v Midland Counties Rly Co* (1853) 13 CB 474 at 478; *Re Severn and Wye and Severn Bridge Rly Co* [1896] 1 Ch 559.

14 *Re Irving, ex p Brett* (1877) 7 ChD 419 at 422.

15 *Re Whitting, ex p Rowell* (1878) 39 LT 259 (affd sub nom *Re Whitting, ex p Hall* (1879) 10 ChD 615, CA); *Knill v Prowse* (1884) 33 WR 163; Jacob's Law Dictionary, sv Chose.

16 YB 21 Edw 4 fo 84; *Gerrard v Boden* (1627) Het 80; 5 Co Rep 89; Fitzherbert, Grand Abridgment, sv Grant 45; Sheppard's Abridgment, sv Chose in Action; Blount's Law Dictionary, sv Chose in Action.

17 *Norcutt v Dodd* (1841) Cr & Ph 100.

18 *Wiltshire v Rabbits* (1844) 14 Sim 76.

19 *Row v Dawson* (1749) 1 Ves Sen 331.

20 See generally **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq.

21 *Master v Miller* (1791) 4 Term Rep 320 at 340; *R v Duru* [1973] 3 All ER 715, [1974] 1 WLR 2, CA; *Willingale (Inspector of Taxes) v International Commercial Bank Ltd* [1978] AC 834, [1978] 1 All ER 754, HL; and see *The Brimnes, Tenax Steamship Co Ltd v Owners of MV Brimnes* [1975] QB 929 at 964-965, [1974] 3 All ER 88 at 111, CA, per Megaw LJ, distinguishing the receipt of a cheque from telex instructions.

22 *Trans Trust SPRL v Danubian Trading Co Ltd* [1952] 2 QB 297 at 305, [1952] 1 All ER 970 at 977, CA, per Denning LJ; *Intraco Ltd v Notis Shipping Corp* [1981] 2 Lloyd's Rep 256, CA.



23 *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178.

24 *Wells v Wells* [1914] P 157, CA; and see **LEGAL PROFESSIONS** vol 66 (2009) PARA 1305.

25 See **LEGAL PROFESSIONS** vol 66 (2009) PARA 1293 et seq.

26 Ie under CPR Pt 36, before the amendments to Pt 36 by virtue of which a party making an offer to settle is no longer required to make a payment into court. As to offers to settle see **CIVIL PROCEDURE** vol 11 (2009) PARA 729 et seq.

27 *WA Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] QB 1038, [1985] 1 All ER 216, CA. The money became subject to whatever order the court might see fit to make.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/6. Rights under a contract.

## 6. Rights under a contract.

The benefit of a contract has been held to be a chose in action<sup>1</sup>. Examples are:

- 22 (1) a contract to purchase a reversionary interest<sup>2</sup>;
- 23 (2) policies of insurance of every kind<sup>3</sup>, including a claim for indemnity under an insurance policy<sup>4</sup>;
- 24 (3) a conditional right to be granted leases<sup>5</sup>;
- 25 (4) a contractual right to a future sum<sup>6</sup>, which need not be ascertainable at the outset<sup>7</sup>, and a contingent right to an additional capital sum<sup>8</sup>;
- 26 (5) an option to purchase land, whether or not granted by the terms of a lease<sup>9</sup>;
- 27 (6) an option to purchase shares<sup>10</sup>;
- 28 (7) an option under a recording contract<sup>11</sup>;
- 29 (8) a right to be issued shares in a company<sup>12</sup>;
- 30 (9) an undertaking to pay calls on shares<sup>13</sup>;
- 31 (10) a right to half of the profit that might accrue from an increase in share values<sup>14</sup>;
- 32 (11) mooring rights for a houseboat at a wharf on a river<sup>15</sup>;
- 33 (12) rights under a hire purchase agreement<sup>16</sup>;
- 34 (13) a covenant of surety relating to the tenant's obligations under a lease<sup>17</sup>;
- 35 (14) a ticket in a Derby sweepstake<sup>18</sup>;
- 36 (15) a contract evidenced by a ticket for a passage on a ferry<sup>19</sup> or for travel on the London Underground<sup>20</sup>;
- 37 (16) sub-freights<sup>21</sup>;
- 38 (17) the benefit of a contract to sell a house, the price being payable by monthly instalments over ten years<sup>22</sup>;
- 39 (18) a right to claim contribution<sup>23</sup>;
- 40 (19) the obligation represented by a letter of credit<sup>24</sup>;
- 41 (20) a right of pre-emption<sup>25</sup>;
- 42 (21) rights under a bill of lading<sup>26</sup>;
- 43 (22) rights under a charterparty<sup>27</sup>;
- 44 (23) rights under a licence, for example a licence of an intellectual property right<sup>28</sup>.

Stamps given with goods where the holder of a set of 12 stamps became entitled to a book were held, however, not to give rise to a right which was a thing in action<sup>29</sup>; and rights under a continuing contract for medical services have been held not to be a thing in action<sup>30</sup>.

1 As to the formation of a contract see **CONTRACT** vol 9(1) (Reissue) PARA 629 et seq; and as to the creation of third party rights see the Contracts (Rights of Third Parties) Act 1999; and **CONTRACT**. As to rights under a compromise see *Manley v The Law Society* [1981] 1 All ER 401, [1981] 1 WLR 335, CA.

2 *Torkington v Magee* [1902] 2 KB 427, DC (revsd on another point [1903] 1 KB 644, CA).

3 *Re Moore, ex p Ibbetson* (1878) 8 ChD 519, CA; *Mutual Finance Ltd v Davidson* [1963] 1 All ER 133, [1963] 1 WLR 134, CA; *Foskett v McKeown* [2001] 1 AC 102, [2000] 3 All ER 97, HL. As to insurance policies see generally **INSURANCE**; and as to the assignment of rights under insurance policies see further PARA 20.

- 4 *Fouad Bishara Jabbour v Custodian of Absentee's Property of State of Israel* [1954] 1 All ER 145, [1954] 1 WLR 139.
- 5 *Property Discount Corpn Ltd v Lyon Group Ltd* [1981] 1 All ER 379, [1981] 1 WLR 300, CA.
- 6 *Drummond (Inspector of Taxes) v Austin Brown* [1985] Ch 52, [1984] 2 All ER 699, CA.
- 7 See *Aspden (Inspector of Taxes) v Hildesley* [1982] 2 All ER 53, [1982] 1 WLR 264, where it was a contingent right to a sum of money under an undertaking in a consent order in divorce proceedings.
- 8 *Morgan (Inspector of Taxes) v Gibson* [1989] STC 568.
- 9 See *Griffith v Pelton* [1958] Ch 205 at 225, [1957] 3 All ER 75 at 83-84, CA, per Jenkins LJ; *Re Button's Lease, Inman v Button* [1964] Ch 263, [1963] 3 All ER 708; *George Wimpey & Co Ltd v IRC* [1975] 2 All ER 45, [1975] 1 WLR 995, CA; *Coastplace Ltd v Hartley* [1987] QB 948, [1987] 2 WLR 1289.
- 10 *Abbott v Philbin (Inspector of Taxes)* [1959] 2 All ER 270, [1959] 1 WLR 667 (on appeal on another point [1960] Ch 27, [1959] 3 All ER 590, CA; [1961] AC 352, [1960] 2 All ER 763, HL); *Re Vandervell's Trusts (No 2)* [1974] Ch 269, [1974] 3 All ER 205, CA.
- 11 *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA.
- 12 *Letts v IRC* [1956] 3 All ER 588, [1957] 1 WLR 201.
- 13 *Cambridge Petroleum Royalties Ltd v IRC* [1982] STC 325.
- 14 *Marren (Inspector of Taxes) v Ingles* [1980] 3 All ER 95, [1980] 1 WLR 983, HL, where half the profit was 'a conditional and unquantified amount payable at an unascertained future date'.
- 15 *J Miller Ltd v Laurence and Bardsley* [1966] 1 Lloyd's Rep 90.
- 16 *Spellman v Spellman* [1961] 2 All ER 498, [1961] 1 WLR 921, CA.
- 17 *Coastplace Ltd v Hartley* [1987] QB 948, [1987] 2 WLR 1289.
- 18 *Jones v Carter* (1845) 8 QB 134 at 138.
- 19 *Cockerton v Naviera Aznar SA* [1960] 2 Lloyd's Rep 450, cited without dissent on this point in *Hollingworth v Southern Ferries Ltd, The Eagle* [1977] 2 Lloyd's Rep 70.
- 20 *R v Marshall* [1998] 2 Cr App Rep 282, CA (the ticket or travel card is not itself a chose in action).
- 21 *Richmond Shipping Ltd v D/S and A/S Vestland* [1980] 2 Lloyd's Rep 171; *Care Shipping Corpn v Latin American Shipping Corpn, The Cebu* [1983] QB 1005, [1983] 1 All ER 1121.
- 22 *Lillystone v Supplementary Benefits Commission* (1982) 3 FLR 52, CA.
- 23 *South East Thames Regional Health Authority v YJ Lovell (London) Ltd* (1985) 9 ConLR 36.
- 24 *Jaks (UK) Ltd v Cera Investment Bank SA* [1998] 2 Lloyd's Rep 89.
- 25 *Dear v Reeves* [2001] EWCA Civ 277, [2002] Ch 1, [2001] 1 BCLC 643, distinguishing *Pritchard v Briggs* [1980] Ch 338, [1980] 1 All ER 294, CA, and *Re Campbell (a bankrupt)* [1997] Ch 14, [1996] 2 All ER 537.
- 26 *Caldwell v Ball* (1786) 1 Term Rep 205 at 216.
- 27 *Mangles v Dixon* (1852) 3 HL Cas 702 at 726.
- 28 As to intellectual property rights themselves as choses in action, as opposed to the licensing of such rights, see PARA 9.
- 29 *Stephenson Bros Ltd v Customs and Excise Comrs* [1953] 1 All ER 469, [1953] 1 WLR 335.
- 30 *M (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2008] All ER (D) 66 (Sep). As to personal contracts see further PARA 100.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/7. Rights or causes of action.

## 7. Rights or causes of action.

A right or cause of action has been held to be a chose in action<sup>1</sup>, for example a right of action arising under contract<sup>2</sup>, including a claim for unliquidated damages for breach of contract<sup>3</sup>, or a right of action arising out of tort<sup>4</sup>. Personal rights of action do not pass to a trustee in bankruptcy<sup>5</sup> nor are they ordinarily assignable<sup>6</sup>.

Examples of rights or causes of action which have been held to be choses in action are:

- 45 (1) claims against directors of a company for misfeasance<sup>7</sup>;
- 46 (2) the right of a trustee to recover trust funds from a former trustee guilty of breach of trust<sup>8</sup>;
- 47 (3) an assignor's right to be indemnified by an assignee against the covenants in a lease assigned<sup>9</sup>, although a right of indemnity against all proceedings in respect of the non-payment of the mortgage debt given by the purchaser of mortgaged property to the executors of a deceased mortgagor is not assignable<sup>10</sup>;
- 48 (4) a lessee's right to be relieved against a forfeiture of the lease<sup>11</sup>;
- 49 (5) the right of the vendor of shares to be indemnified by the purchaser against liability in respect of unpaid calls<sup>12</sup>;
- 50 (6) a right of re-entry on non-payment of rent<sup>13</sup>;
- 51 (7) a right of re-entry upon land under a condition arising by virtue of a deed<sup>14</sup>;
- 52 (8) a right or title of entry into land of which a person is disseised<sup>15</sup>;
- 53 (9) the right to a property in title deeds when in the hands of third persons<sup>16</sup>;
- 54 (10) mortgage deeds, being securities for the payment of money<sup>17</sup>;
- 55 (11) in relation to a trade union, the income of the union including contributions, fines, entrance fees or other moneys paid by members<sup>18</sup>;
- 56 (12) a claim to an indemnity<sup>19</sup>;
- 57 (13) a share in a racehorse<sup>20</sup>;
- 58 (14) a right of proof in a liquidation<sup>21</sup>;
- 59 (15) a right to financial adjustment<sup>22</sup>;
- 60 (16) a right of action for infringement of an intellectual property right<sup>23</sup>.

The mere right to apply for costs is not, however, a chose in action<sup>24</sup>; nor is a right to apply to the court for the exercise of its discretion as to whether there should be an inquiry as to damages<sup>25</sup>. A claim for rescission of a mortgage is a right of action but can only be brought by the owner of the mortgaged property and cannot be assigned separately from it<sup>26</sup>.

1 Shep Touch 231; 2 Bl Com 397, 436; Jacob's Law Dictionary, sv Chose.

2 *Brice v Bannister* (1878) 3 QBD 569, CA; *Walker v Bradford Old Bank* (1884) 12 QBD 511; Bro Abr, Chose in Action; *Société United Docks v Government of Mauritius* [1985] AC 585 at 608, [1985] 1 All ER 864 at 876, PC; but see *May v Lane* (1894) 64 LJQB 236 at 238, CA; *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260 at 270-271, CA.

3 *Ogdens Ltd v Weinberg* (1906) 95 LT 567, HL; *Gibbon v Dudgeon* (1881) 45 JP 748; *Re Collbran* [1956] Ch 250, [1956] 1 All ER 310 (breach of a repairing covenant in a lease).

4 Jacob's Law Dictionary, sv Chose; *Termes de la Ley*, sv Chose in Action. Cf *Zim Properties Ltd v Procter (Inspector of Taxes)* [1985] STC 90. A right of action in tort is a thing in action within the meaning of the Married Women's Property Act 1882 s 24 (see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 224); *Curtis v*

*Wilcox* [1948] 2 KB 474, [1948] 2 All ER 573, CA. A claim for damages for false imprisonment has been held to be a 'thing in action' and therefore 'property' when determining the amount that may be realised for the purpose of a confiscation order: see *Re Maye* [2008] UKHL 9, [2008] 1 WLR 315, sub nom *Maye v DPP, Northern Ireland* (2008) Times, 11 February.

5 See *Rogers v Spence* (1846) 12 Cl & Fin 700, HL; *Beckham v Drake* (1849) 2 HL Cas 579; *Rose v Buckett* [1901] 2 KB 449, CA; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL.

6 See PARA 75 text and note 15, PARAS 98-99. See also *Perry v Tendring District Council* [1985] 1 EGLR 260; *RL Polk & Co (Great Britain) Ltd v Edward Hill & Partners* [1988] 1 EGLR 142; *Mulkerrins v PriceWaterhouseCoopers (a firm)* [2003] UKHL 41, [2003] 4 All ER 1, [2003] 1 WLR 1937.

7 *Re Park Gate Waggon Works Co* (1881) 17 ChD 234, CA (decided on the Companies Act 1862 s 95 (repealed), now replaced by the Insolvency Act 1986 ss 165, 167, Sch 4 para 6 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 577 et seq; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 959 et seq)).

8 *Re Benett, Ward v Benett* [1906] 1 Ch 216 at 230, CA.

9 *Re Perkins, Poyser v Beyfus* [1898] 2 Ch 182 at 187, CA; *Butler Estates Co Ltd v Bean* [1942] 1 KB 1, [1941] 2 All ER 793, CA.

10 *Rendall v Morphew* (1914) 84 LJCh 517.

11 *Howard v Fanshawe* [1895] 2 Ch 581 at 589.

12 *British Union and National Insurance Co v Rawson* [1916] 2 Ch 476, CA.

13 Sheppard's Abridgment, sv Chose in Action.

14 Co Litt 214; *Winter's Case* (1572) 3 Dyer 308b.

15 Bro Abr, Chose in Action pl 14; Shep Touch 231; Tomlin's Law Dictionary, sv Choses; Vin Abr, Assignment.

16 YB 9 Hen 6 pl 64; Bro Abr, Chose in Action; *Hobson v Mellond* (1841) 2 Mood & R 342; and see 33 Harvard Law Review 997.

17 *R v Powell* (1852) 21 LJMC 78; and cf *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396, CA.

18 *Con-Mech (Engineers) Ltd v Amalgamated Union of Engineering Workers (Engineering Section) (No 3)* [1974] ICR 464, NIRC, where the court also referred to rents, dividends, stocks, shares, securities, the benefit of contracts, bank balances and other debts.

19 *Bourne v Colodense Ltd* [1985] ICR 291, CA.

20 *Re Sugar Properties (Derisley Wood) Ltd* [1988] BCLC 146.

21 *Barclays Bank Ltd v TOSG Trust Fund Ltd* [1984] AC 626, [1984] 1 All ER 628, CA.

22 *Magor and St Mellons RDC v Newport Corpn* [1950] 2 All ER 1226, CA; affd [1952] AC 189, [1951] 2 All ER 839, HL.

23 As to intellectual property rights themselves as choses in action, as opposed to the rights of action for the infringement of such rights, see PARA 9.

24 *Re Marly Laboratory Ltd's Application* [1952] 1 All ER 1057, CA.

25 *Westpac Banking Corpn v Armitage* [2004] EWHC 705 (Ch), [2004] All ER (D) 334 (Mar). Such a right is not assignable: *Westpac Banking Corpn v Armitage* [2004] EWHC 705 (Ch), [2004] All ER (D) 334 (Mar).

26 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 118, [1998] 1 WLR 896 at 916, HL, per Lord Hoffmann.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/8. Shares etc.

## 8. Shares etc.

The following recognised subjects of property are choses in action, namely stock in public funds<sup>1</sup>; a share of bank stock<sup>2</sup>; and shares in joint stock companies<sup>3</sup>, and presumably in every kind of company<sup>4</sup>, including stock issued by national corporations<sup>5</sup>.

1 *Dundas v Dutens* (1790) 1 Ves 196; and see also *Wildman v Wildman* (1803) 9 Ves 174 at 177.

2 *Re Butler's Trusts*, *Hughes v Anderson* (1888) 38 ChD 286 at 289, CA; and see *R v Capper*, *Re Bowler* (1817) 5 Price 217.

3 *Humble v Mitchell* (1839) 11 Ad & El 205 at 208.

4 *Colonial Bank v Whinney* (1886) 11 App Cas 426, HL; *Re VGM Holdings Ltd* [1942] Ch 235 at 241, [1942] 1 All ER 224 at 226, CA, per Lord Greene MR, cited in *George Wimpey and Co Ltd v IRC* [1975] 2 All ER 45, [1975] 1 WLR 995, CA; *Re Vandervell's Trusts (No 2)* [1974] Ch 269, [1974] 3 All ER 205, CA; and see *Torkington v Magee* [1902] 2 KB 427 at 430 (revsd on another point [1903] 1 KB 644, CA); *R v Chief Metropolitan Magistrate, ex p Government of the Republic of Singapore* (1977) 70 Cr App Rep 77, DC; *Unilever (UK) Holdings Ltd v Smith (Inspector of Taxes)* [2002] EWCA Civ 1787, [2003] STC 15, [2002] All ER (D) 147 (Dec). It has, however, been said that a share in a trading company resembles a chose in action only in that it is assignable: *Singer v Williams* [1921] 1 AC 41 at 53, HL, per Lord Atkinson. As to shares see generally **COMPANIES**; and as to the transfer of shares see further PARA 18.

5 Eg British Electricity Stock created and issued under the Electricity Act 1957 s 16 (repealed) or the Electricity Act 1940 s 147 (repealed). As to the transfer of all the rights and liabilities to which the former Electricity Council was entitled or subject immediately before 31 March 1990 (ie the transfer date) under the terms of issue of British Electricity Stock to the Treasury see the Electricity Act 1989 s 91; and **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1034.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/9. Intellectual property.

## 9. Intellectual property.

Copyright is described by statute as a property right<sup>1</sup> and has been held to be a chose in action<sup>2</sup>. Design right under Part III of the Copyright, Designs and Patents Act 1988<sup>3</sup> is also so described<sup>4</sup>, is transmissible as personal or movable property<sup>5</sup> and may thus be regarded as a chose in action.

The registration of a design under Registered Designs Act 1949 gives the registered proprietor the exclusive right to use the design and any design which does not produce on the informed user a different overall impression<sup>6</sup>, thus creating a species of intangible property capable of transfer<sup>7</sup>. The right to apply for registration is also intangible property capable of transfer<sup>8</sup>. Both rights may be regarded as choses in action.

A registered trade mark is described by statute as personal property<sup>9</sup> and is capable of assignment<sup>10</sup>, as is an application for the registration of a trade mark<sup>11</sup>. Both may be regarded as choses in action.

The position is, however, different with regard to patents, since the Patents Act 1977 specifically states that while a patent and an application for a patent are both personal property, neither is a thing in action<sup>12</sup>. The 1977 Act provides for the assignment of patents and applications for patents<sup>13</sup>.

1 See the Copyright, Designs and Patents Act 1988 s 1(1) (amended by SI 2003/2498); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 57.

2 *Chaplin v Leslie Frewin (Publishers) Ltd* [1966] Ch 71, [1965] 3 All ER 764, CA; *Paterson Zochonis & Co Ltd v Merfarken Packaging Ltd* [1986] 3 All ER 522, CA; *Campbell Connolly & Co Ltd v Noble* [1963] 1 All ER 237, [1963] 1 WLR 252. See also Williams Personal Property (1st Edn 1848) p 6, where the author says: 'For want of a better classification, these subjects [patents, copyrights, etc] of personal property are now usually spoken of as choses in action. They are, in fact, personal property of an incorporeal nature, and a recurrence to the history of their classification amongst choses in action will help to explain some of their peculiarities'. But see 9 LQR 311, 314, 10 LQR 314, 11 LQR 71, 238.

3 The unregistered design right under the Copyright, Designs and Patents Act 1988 Pt III (ss 213-264): see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 501 et seq.

4 See the Copyright, Designs and Patents Act 1988 s 213(1); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 501.

5 See the Copyright, Designs and Patents Act 1988 s 222(1); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 522.

6 See the Registered Designs Act 1949 s 7(1) (substituted by SI 2001/3949); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 762.

7 As to the registration of assignments see the Registered Designs Act 1949 s 19(1); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 700.

8 See the Registered Designs Act 1949 s 2(2) (amended by SI 2001/3949); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 722.

9 See the Trade Marks Act 1994 s 22; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 127.

10 See the Trade Marks Act 1994 s 24; and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 129.

11 See the Trade Marks Act 1994 s 27(1); and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 127.

12 See the Patents Act 1977 s 30(1); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARAS 303, 360, 373. The right to sue for infringement of a patent may, however, be regarded as a chose in action. Patent rights and future patent rights were previously held to be choses in action: see *Re Heath's Patent* (1912) 56 Sol Jo 538; *Edwards & Co v Picard* [1909] 2 KB 903 at 905, CA, per Vaughan Williams LJ; *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462; *Beecham Group plc v Gist-Brocades NV* [1986] 1 WLR 51 at 59, [1986] RPC 203 at 246, HL, per Lord Diplock. 'An English patent is a species of English property of the nature of a chose in action and peculiar in character': *British Nylon Spinners Ltd v ICI Ltd* [1953] Ch 19 at 26, [1952] 2 All ER 780 at 783, CA, per Sir Raymond Evershed MR, cited on the substantive hearing of the same case [1955] Ch 37 at 51, [1954] 3 All ER 88 at 91.

13 See the Patents Act 1977 s 30(2), (5)-(7) (amended by SI 2004/2357); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 374.



Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/10. Equitable rights.

## 10. Equitable rights.

Equitable rights to property have been held to be choses in action, for example:

- 61 (1) beneficial interests under trusts (or, formerly, uses<sup>1</sup>) and in trust funds<sup>2</sup>;
- 62 (2) legacies<sup>3</sup> and the like, including equitable interests in a fund etc<sup>4</sup> and the right of a residuary legatee or person entitled on intestacy to have the estate duly administered<sup>5</sup>;
- 63 (3) a share in a partnership<sup>6</sup>;
- 64 (4) the right of a mortgagor to any surplus proceeds of sale<sup>7</sup> upon the exercise by the mortgagee of his powers<sup>8</sup> of sale<sup>9</sup>.

Reversionary interests in trust funds<sup>10</sup>, including reversionary interests in chattels settled as heirlooms<sup>11</sup>, have also been held to be choses in action. Entailed interests in personalty could formerly be created under the Law of Property Act 1925<sup>12</sup> but it has not been possible to create an entailed interest in either real or personal property since the Trusts of Land and Appointment of Trustees Act 1996 came into force on 1 January 1997<sup>13</sup>.

1 4 Co Inst 85; and cf Gilbert on Uses 198, and Gilbert on Uses (Sugden's Edn) 399; Holmes, Common Law 407.

2 *Pigott v Stewart* [1875] WN 69; *Space Investments Ltd v Canadian Imperial Bank of Commerce Trust Co (Bahamas) Ltd* [1986] 3 All ER 75, [1986] 1 WLR 1072, PC; *R v Walbrook and Glasgow* [1994] Crim LR 613, CA. As to trusts see generally **EQUITY; TRUSTS**.

3 *Jennings v Bond* (1845) 8 IR Eq 755; *Seys v Price* (1740) 9 Mod Rep 217 at 218.

4 *Grosvenor v Lane* (1741) 2 Atk 180; *Re Freshfield's Trust* (1879) 11 ChD 198 at 200; *Dearle v Hall*, *Loveridge v Cooper* (1828) 3 Russ 1 at 11; *Wilkinson v Charlesworth* (1847) 10 Beav 324 at 328.

5 *Re Leigh's Will Trusts, Handyside v Durbridge* [1970] Ch 277, [1969] 3 All ER 432; *Davenport (Inspector of Taxes) v Chilver* [1983] Ch 293, [1983] 3 WLR 481; *Re K* [1986] Ch 180, [1985] 2 All ER 833, CA; *Marshall (Inspector of Taxes) v Kerr* [1995] 1 AC 148 at 158, [1994] 3 All ER 106 at 113, HL, per Lord Templeman; and see *Re Maye* [2008] UKHL 9, [2008] 1 WLR 315, sub nom *Maye v DPP, Northern Ireland* (2008) Times, 11 February (an interest in an unadministered intestate estate was a 'thing in action' and therefore 'property' when determining the amount that might be realised for the purpose of a confiscation order). As to the administration of estates see generally **EXECUTORS AND ADMINISTRATORS**.

6 *Re Bainbridge, ex p Fletcher* (1878) 8 ChD 218.

7 See the Law of Property Act 1925 s 105; the Land Registration Act 2002 s 54; and **MORTGAGE** vol 77 (2010) PARA 472.

8 Ie by virtue of the Law of Property Act 1925 s 101: see **MORTGAGE** vol 77 (2010) PARA 443.

9 *Bucknell v Bucknell* [1969] 2 All ER 998, [1969] 1 WLR 1204.

10 *Robinson v Bavasor* (1734) 2 Eq Cas Abr 90; *Hornsby v Lee* (1816) 2 Madd 16; *Honner v Morton* (1828) 3 Russ 65 at 68; *Curtis v Sheffield* (1836) 8 Sim 176; *Le Vasseur v Scrutton* (1844) 14 Sim 116; *Re Butler's Trusts, Hughes v Anderson* (1888) 38 ChD 286 at 292, CA.

11 *Re Tritton, ex p Singleton* (1889) 61 LT 301; *Re Thynne, Thynne v Grey* [1911] 1 Ch 282.

12 Ie under the Law of Property Act 1925 s 130 (as originally enacted).

13 See the Trusts of Land and Appointment of Trustees Act 1996 s 2, Sch 1 para 5; and **REAL PROPERTY; TRUSTS** vol 48 (2007 Reissue) PARAS 605, 670, 735.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/11. Leases over land.

## **11. Leases over land.**

Leases over land are classified as a form of real property<sup>1</sup>; but the contractual aspect of a lease<sup>2</sup> may also justify its classification as a chose in action. The creation and nature of leases and their assignment are discussed elsewhere in this work<sup>3</sup>.

A reversion, with its accompanying right to sue for future rent, has been held not to be a chose in action<sup>4</sup>.

1 See the Law of Property Act 1925 s 1(1)(b); and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 2.

2 See eg *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 at 413, [1999] 3 All ER 481 at 485-486, HL, per Lord Hoffmann. See also *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) CLR 17 at 51, Aust HC, per Deane J, referring to 'a duality of character which can give rise to conceptual difficulties. It is both an executory contract and an executed demise. Its origins lie in contract rather than in real property'.

3 See generally **LANDLORD AND TENANT**.

4 See *Edlington Properties Ltd v JH Fenner & Co Ltd* [2005] EWHC 2158 (QB), [2006] 1 All ER 98, [2006] 1 EGLR 29; affd [2006] EWCA Civ 403, [2006] 3 All ER 1200, [2006] 1 WLR 1583.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/1. DESCRIPTION AND CLASSIFICATION/(2) CLASSIFICATION/(ii) Enumeration of Choses in Action/12. Rights which are not choses in action.

## 12. Rights which are not choses in action.

As is illustrated by the examples set out in the preceding paragraphs<sup>1</sup>, the term 'choses in action' now embraces a wide range of miscellaneous rights. A number of other rights and forms of property have been held not to be choses in action. Examples are:

- 65 (1) a mere right to apply for an order for costs<sup>2</sup>;
- 66 (2) a right to apply to the court for the exercise of the court's discretion as to whether there should be an inquiry as to damages<sup>3</sup>;
- 67 (3) a liability which has been brought about by fraud where a claim to enforce that liability is capable of immediate defeasance as soon as the fraud is pleaded<sup>4</sup>;
- 68 (4) an export quota<sup>5</sup>;
- 69 (5) the prospect of receiving an award from the Criminal Injuries Compensation Board (now the Criminal Injuries Compensation Authority)<sup>6</sup>;
- 70 (6) the right to a vehicle registration mark<sup>7</sup>;
- 71 (7) a reversion, with its accompanying right to sue for future rent<sup>8</sup>;
- 72 (8) rights under a continuing contract for medical services<sup>9</sup>;
- 73 (9) a claim for rescission of a mortgage<sup>10</sup>;
- 74 (10) money paid into court under the procedure for offers to settle which applied before 1 April 2007<sup>11</sup>.

Additionally, and in contrast to other forms of intellectual property<sup>12</sup>, the Patents Act 1977 specifically states that while a patent and an application for a patent are both personal property, neither is a thing in action<sup>13</sup>.

1 See PARAS 5-11.

2 *Re Marly Laboratory Ltd's Application* [1952] 1 All ER 1057, CA.

3 *Westpac Banking Corp v Armitage* [2004] EWHC 705 (Ch), [2004] All ER (D) 334 (Mar).

4 *R v Thompson* [1984] 3 All ER 565, [1984] 1 WLR 962, CA.

5 *A-G of Hong Kong v Nai-Keung* [1987] 1 WLR 1339, PC.

6 *Re Campbell (a bankrupt)* [1997] Ch 14, [1996] 2 All ER 537, distinguished in *Dear v Reeves* [2001] EWCA Civ 277, [2002] Ch 1, [2001] 1 BCLC 643. As to the Criminal Injuries Compensation Authority, which was established in 1996, the abolition of the Criminal Injuries Compensation Board with effect from 31 March 2000, and the transfer on that date to the Authority of applications before the Board see **CRIMINAL LAW, EVIDENCE AND PROCEDURE** vol 11(4) (2006 Reissue) PARA 2033 et seq.

7 *Goel v Pick* [2006] EWHC 833 (Ch), [2007] 1 All ER 982, [2006] RTR 355.

8 See *Edlington Properties Ltd v JH Fenner & Co Ltd* [2005] EWHC 2158 (QB), [2006] 1 All ER 98, [2006] 1 EGLR 29; affd [2006] EWCA Civ 403, [2006] 3 All ER 1200, [2006] 1 WLR 1583.

9 *M (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2008] All ER (D) 66 (Sep).

10 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 118, [1998] 1 WLR 896 at 916, HL, per Lord Hoffmann.

- 11 *WA Sherratt Ltd v John Bromley (Church Stretton) Ltd* [1985] QB 1038, [1985] 1 All ER 216, CA.
- 12 As to intellectual property see generally PARA 9.
- 13 See the Patents Act 1977 s 30(1). The right to sue for infringement of a patent may, however, be regarded as a chose in action.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(1) GENERAL CONSIDERATIONS REGARDING ASSIGNMENTS/13. Historical development of the law of assignment.

## 2. ASSIGNMENT OF CHOSSES IN ACTION

### (1) GENERAL CONSIDERATIONS REGARDING ASSIGNMENTS

#### 13. Historical development of the law of assignment.

Generally speaking, and subject to very limited exceptions<sup>1</sup>, the common law did not permit the assignment of choses in action<sup>2</sup>. From early times, however, equity took a different view, and recognised assignments<sup>3</sup>. In the case of equitable choses in action, the assignee could bring an action in his own name. In the case of legal choses in action, equity could not effect the transfer of the legal interest, and the action had to be brought in the name of the legal owner of the chose, the assignor. If necessary, equity would compel the assignor to lend his name to the proceedings<sup>4</sup>.

The Supreme Court of Judicature Act 1873 enabled the assignee of a legal chose to bring an action in his own name, provided the statutory conditions were met<sup>5</sup>. The relevant provision of that Act has now been replaced by the provision of the Law of Property Act 1925 permitting legal assignments of things in action<sup>6</sup>, which applies generally to debts or other legal things in action. In addition to that provision, there are a number of other statutory provisions dealing with the transfer of other types of right, such as shares<sup>7</sup>, contracts of life and marine insurance<sup>8</sup> and intellectual property rights<sup>9</sup>.

<sup>1</sup> See PARAS 16-17.

<sup>2</sup> 2 Bl Com 442; *Lampet's Case* (1612) 10 Co Rep 46b; *Termes de la Ley*, sv Chose in Action; *Master v Miller* (1791) 4 Term Rep 320 (affd (1793) 5 Term Rep 367); and see *Picker v London and County Banking Co* (1887) 18 QBD 515 at 519, CA. It would seem that there was also an exception in the case of an annuity: *Co Litt* 144b; *Baker v Brook* (1549) 1 Dyer 65a; *Maund's Case* (1601) 7 Co Rep 28b; *Gerrard v Boden* (1627) Het 80.

<sup>3</sup> See PARA 24. Such assignments will now be given effect in all courts to the same extent and in the same manner as formerly in a court of equity: see the Supreme Court Act 1981 s 49; *Fitzroy v Cave* [1905] 2 KB 364 at 373, CA. As from 1 October 2009, the Supreme Court Act 1981 is retitled the Senior Courts Act 1981: see the Constitutional Reform Act 2005 Sch 11 Pt 1 para 1; the Constitutional Reform Act 2005 (Commencement No 11) Order 2009, SI 2009/1604, art 2(d).

<sup>4</sup> See PARA 68. As a consequence in most cases the assignee became able to sue in the name of the assignor, even at common law: *Master v Miller* (1791) 4 Term Rep 320 at 340 (affd (1793) 5 Term Rep 367); *Legh v Legh* (1799) 1 Bos & P 447; *Roxburghe v Cox* (1881) 17 ChD 520 at 526, CA, per James LJ; YB 15 Hen 7 fo 2; Bro Abr, Chose in Action pl 3. In some cases a power of attorney was given for this purpose: Ames, 3 Harvard Law Review 340 and note; 1 Lilly's Abridgment, Assignment 103. See also *Deering v Farrington* (1674) 3 Keb 304; *Baker v Edmonds* (1647) Sty 62; *Fowke v Boyle* (1652) Sty 348; Williams, Personal Property (1st Edn) 101; Dicey's Treatise on the rules for the selection of parties to an action, pp 66-72; 33 Harvard Law Review 997; 47 LQR 516; 48 LQR 248, 547.

<sup>5</sup> See the Supreme Court of Judicature Act 1873 s 25(6) (repealed and replaced by the Law of Property Act 1925 s 136 (see PARA 72 et seq)). The Supreme Court of Judicature Act 1873 was held to be retrospective: *Dibb v Walker* [1893] 2 Ch 429.

<sup>6</sup> Ie the Law of Property Act 1925 s 136: see PARA 72 et seq.

<sup>7</sup> See PARA 18.

<sup>8</sup> See PARA 20.

9 See PARA 21.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(1) GENERAL CONSIDERATIONS REGARDING ASSIGNMENTS/14. General power of assignment.

#### **14. General power of assignment.**

The present position is that as a general rule choses in action may be transferred from one person to another by assignment *inter vivos*; there are, however, certain exceptions to this rule which are dealt with elsewhere in this title<sup>1</sup>. Further, although a chose in action, such as a debt, which is a right to sue the debtor, can be assigned or made available to a third party, it cannot be assigned to the debtor, who cannot sue himself<sup>2</sup>.

<sup>1</sup> See PARA 92 et seq. An assignment to a third party of an illegal contract is not itself necessarily illegal. The validity of the assignment does not cure the illegality of the contract but collateral provisions in the assignment may be enforceable against the assignor: *Portland Holdings Ltd v Cameo Motors Ltd* [1966] NZLR 571, NZ CA. As to third party debt orders, by which a judgment creditor may secure the payment to himself of a debt owed to his debtor by another person, see **CIVIL PROCEDURE** vol 12 (2009) PARA 1411 et seq. As to attachment of earnings, by which the payment of maintenance orders and judgment debts may be recovered, see the Attachment of Earnings Act 1971; and **CIVIL PROCEDURE** vol 12 (2009) PARA 1431 et seq; **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 73 (2009) PARA 627 et seq. It was held in *Re Green (a bankrupt), ex p Official Receiver v Cutting* [1979] 1 All ER 832, [1979] 1 WLR 1211 that an order made under the Attachment of Earnings Act 1971 does not effect an assignment to the judgment creditor of the moneys to which the order referred: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1441. As to novation of contracts, which is the substitution of a new contract for the old, see **CONTRACT** vol 9(1) (Reissue) PARA 1036 et seq.

<sup>2</sup> *Re Charge Card Services Ltd* [1987] Ch 150, [1986] 3 All ER 289; affd on other grounds [1989] Ch 497, [1988] 3 All ER 702, CA.



Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(1) GENERAL CONSIDERATIONS REGARDING ASSIGNMENTS/15. Modes of transfer.

## 15. Modes of transfer.

Choses in action can be transferred in one or more of the following ways. First, at common law, under one of the two limited exceptions to the common law rule prohibiting assignment<sup>1</sup>. Secondly, pursuant to a statutory provision. There is no single statutory provision for the assignment of choses in action; the closest to such a provision is the provision of the Law of Property Act 1925 permitting legal assignments of things in action<sup>2</sup>, which provides, under certain conditions, for the assignment of any debt or other legal chose in action<sup>3</sup>. In addition to that provision, there are a number of more specific statutory provisions providing for the assignment of specific choses<sup>4</sup>. Thirdly, there are equitable assignments, which again can take a number of different forms<sup>5</sup>.

These modes of transfer are all voluntary. Choses in action will pass involuntarily (by operation of law) to an executor or administrator on death<sup>6</sup>, on bankruptcy<sup>7</sup> or otherwise by operation of law<sup>8</sup>.

1 See PARAS 16-17.

2 See the Law of Property Act 1925 s 136(1), replacing the Supreme Court of Judicature Act 1873 s 25(6) (repealed); and PARA 72 et seq.

3 See note 2.

4 See PARA 18 et seq.

5 See PARA 24 et seq.

6 See PARA 86. Choses in action will, as a rule, pass to the executors under a will: see **EXECUTORS AND ADMINISTRATORS**. As to the power of a testator to dispose of beneficial interests in choses in action see **WILLS** vol 50 (2005 Reissue) PARA 334.

7 See PARA 87.

8 See PARAS 88-91.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSSES IN ACTION/(2) EXCEPTIONS TO THE COMMON LAW RULE AGAINST  
 ASSIGNMENTS/16. Assignments by and to the Crown.

## **(2) EXCEPTIONS TO THE COMMON LAW RULE AGAINST ASSIGNMENTS**

### **16. Assignments by and to the Crown.**

As an exception to the general rule at common law, the Crown has always been able to assign choses or things in action provided that these were certain in amount, as, for instance, ascertained specialty debts, but not those which were uncertain, as, for instance, claims for unliquidated damages<sup>1</sup>, nor at common law could the Crown assign a debt due upon a simple contract only and not by specialty<sup>2</sup>. At common law a subject might generally assign to the Crown choses or things in action which were certain<sup>3</sup>, but a portion of a debt could not be assigned to the Crown<sup>4</sup>, nor could a debt by simple contract<sup>5</sup>. The provisions of the Law of Property Act 1925 whereby an assignee is empowered to sue in his own name<sup>6</sup> now apply to the Crown<sup>7</sup>.

1 Com Dig Assignment D; Bro Abr, Chose in Action; Termes de la Ley, sv Chose in Action; Co Litt 232b, note 1; YB 2 Hen 7, fo 8, pl 25; *Willion v Berkley* (1561) 1 Plowd 223; *Brevertton's Case* (1537) 1 Dyer 30b; *Miles v Williams* (1714) 1 P Wms 249; *Master v Miller* (1791) 4 Term Rep 320 at 340 per Buller J (affd (1793) 5 Term Rep 367). This exception may be derived from the universal succession accruing to the Crown on forfeitures: Pollock's Principles of Contract (13th Edn) 571.

2 Sheppard's Abridgment fo 338. It is doubtful whether the Crown can assign to a subject in general terms choses in action which are real, such as rights of action in relation to land: Bro Abr, Patents pl 98; Chose in Action pl 14; *Priddle and Napper's Case* (1612) 11 Co Rep 8b at fo 12; Chitty's Prerogatives of the Crown 338. The Crown may, however, by special words, assign to a subject a right of entry (Vin Abr, Prerogative of the King G b 3).

3 Sheppard's Abridgment fo 339.

4 *R v Allen* (1584) Owen 2.

5 Sheppard's Abridgment fo 338.

6 In the Law of Property Act 1925 s 136: see PARA 72 et seq.

7 See the Law of Property Act 1925 s 208(3).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(2) EXCEPTIONS TO THE COMMON LAW RULE AGAINST ASSIGNMENTS/17. Assignments by the law merchant.

## 17. Assignments by the law merchant.

The law merchant, which is part of the law of England<sup>1</sup>, recognised the assignability of various choses or things in action<sup>2</sup>, for example bills of exchange, promissory notes and drafts payable to bearer<sup>3</sup>, bills of lading<sup>4</sup> and policies of marine insurance<sup>5</sup>. The assignment of these choses in action is now regulated by statute<sup>6</sup>, except in the case of those negotiable instruments which do not come within the terms of the Bills of Exchange Act 1882, to which the law merchant continues to apply.

1 Co Litt 182a; *Barnett v Brandao* (1843) 6 Man & G 630 at 665; on appeal sub nom *Brandao v Barnett* (1846) 3 CB 519, HL. See also *Edie v East India Co* (1761) 2 Burr 1216 at 1226.

2 *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658; *Edelstein v Schuler & Co* [1902] 2 KB 144.

3 *Goodwin v Roberts* (1875) LR 10 Exch 337 at 343; affd (1876) 1 App Cas 476, HL. See also *Master v Miller* (1791) 4 Term Rep 320 at 342 per Buller J (affd (1793) 5 Term Rep 367); *Wookey v Pole* (1820) 4 B & Ald 1.

4 *Lickbarrow v Mason* (1794) 5 Term Rep 683; *Newsom v Thornton* (1805) 6 East 17 at 40 per Lord Ellenborough CJ.

5 The assignee could not sue in his own name, but the action was brought by the assignor, being the original holder of the policy, as trustee for his assignee: *Sparkes v Marshall* (1836) 2 Bing NC 761 at 774; *Powles v Innes* (1843) 11 M & W 10 at 13 per Parke B; *Boddington v Castelli* (1853) 1 E & B 879. Respondentia bonds (ie bonds hypothecating cargo) were also assignable by the law merchant: *Master v Miller* (1791) 4 Term Rep 320 at 342 per Buller J.

6 I.e. the Bills of Exchange Act 1882 (see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1400 et seq); the Carriage of Goods by Sea Act 1924 (see PARA 22; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 338 et seq); and the Marine Insurance Act 1906 ss 50, 51 (see *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257; PARA 20; and **INSURANCE** vol 25 (2003 Reissue) PARA 389).

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSSES/18. Transfer of shares and securities.

### **(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSSES**

#### **18. Transfer of shares and securities.**

Particular statutory regimes apply to the assignment of shares and interests in government stock<sup>1</sup>, certain local authority stocks<sup>2</sup>, shares and mortgages and bonds for securing money issued by companies regulated by the Companies Clauses Acts<sup>3</sup> and shares in and debentures of companies formed and registered under the Companies Act 1985 or the Companies Act 2006<sup>4</sup>.

Subject to certain exceptions<sup>5</sup>, an absolute assignment in writing of stock or marketable securities is liable to stamp duty<sup>6</sup> as a conveyance<sup>7</sup>.

The transfer of shares and securities is discussed in detail elsewhere in this work<sup>8</sup>.

1 See eg the Government Stock Regulations 2004, SI 2004/1611, Pt 3 (regs 7-35); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1335 et seq. As to the simplified procedure for transfer see note 4.

2 See the Local Authority (Stocks and Bonds) Regulations 1974, SI 1974/519. As to the simplified procedure for the transfer of certain securities see note 4.

3 See the Companies Clauses Consolidation Act 1845 ss 14, 46; and **COMPANIES** vol 15 (2009) PARAS 1716, 1751. As to the simplified procedure for the transfer of certain securities see note 4.

4 As to the transfer of shares see **COMPANIES** vol 14 (2009) PARA 389 et seq; and as to the form and execution of a transfer of shares see **COMPANIES** vol 14 (2009) PARA 399. A simplified procedure for the transfer of registered securities (including securities of limited companies, securities of certain bodies incorporated by or under statute or by royal charter, government securities (subject to certain exceptions) and securities issued by local authorities) was introduced by the Stock Transfer Act 1963: see s 1; and **COMPANIES** vol 14 (2009) PARA 400. The Stock Transfer Act 1982 s 1(1) provides for the computerised transfer of certain securities: see **COMPANIES** vol 14 (2009) PARA 430. Title to units of a security may be evidenced otherwise than by a certificate and transferred otherwise than by a written instrument: see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 2(1). 'Security' includes shares: reg 3(1). See further **COMPANIES** vol 14 (2009) PARA 421 et seq. As to the equitable assignment of shares see PARA 37 text and note 24.

5 See the Finance Act 1999 Sch 13 para 1(3)-(6) (amended by the Finance Act 2003 Sch 40 para 5; the Finance Act 2008 s 98(1)-(3), Sch 32 paras 9, 10); and **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

6 See under the Finance Act 1999 Sch 13 Pt I: see **STAMP DUTIES AND STAMP DUTY RESERVE TAX**.

7 See the Finance Act 2003 s 125(1).

8 See generally **COMPANIES**.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSES/19. Transfer of bills of exchange and other negotiable instruments.

## **19. Transfer of bills of exchange and other negotiable instruments.**

The Bills of Exchange Act 1882 makes particular provision for the assignment of negotiable instruments<sup>1</sup>.

The holder in due course of a negotiable instrument holds it free from all equities<sup>2</sup>. This rule applies to bills of exchange, promissory notes and cheques (unless restrictively indorsed or overdue at the date of negotiation<sup>3</sup>), and also to other documents which are, by the law merchant or custom of trade, negotiable instruments<sup>4</sup>.

The transfer of bills of exchange and other negotiable instruments is discussed in detail elsewhere in this work<sup>5</sup>.

1 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1401-1404.

2 *London Joint Stock Bank v Simmons* [1892] AC 201 at 206, HL, per Lord Halsbury LC; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 976, 1488.

3 See **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1492-1495.

4 As to what are negotiable instruments see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARAS 1404, 1610 et seq.

5 See generally **FINANCIAL SERVICES AND INSTITUTIONS**.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSES/20. Assignment of rights under insurance policies.

## 20. Assignment of rights under insurance policies.

Where a loss under an indemnity insurance policy has already taken place, the right to recover the sum payable is a right of action assignable either in equity<sup>1</sup> or under the Law of Property Act 1925<sup>2</sup>. A future claim, however, cannot be assigned<sup>3</sup> although it is capable of being the subject of a contract to assign. Because of the personal nature of most contracts for indemnity insurance, the policy itself is generally not capable of assignment<sup>4</sup>; but a policy insuring property may be assigned contemporaneously with the transfer of the relevant property, provided that the insurer consents to the assignment<sup>5</sup>.

Particular statutory provision is made for the legal assignment of certain insurance policies. Policies of life insurance may be assigned under the Policies of Assurance Act 1867<sup>6</sup> and marine policies may be assigned under the Marine Insurance Act 1906<sup>7</sup>. Legal assignment under these provisions is, however, an alternative to, rather than in substitution for, assignment under the relevant provisions<sup>8</sup> of the Law of Property Act 1925<sup>9</sup>.

The law relating to insurance is discussed in detail elsewhere in this work<sup>10</sup>.

1 As to equitable assignment generally see PARA 24 et seq; and as to the equitable assignment of life policies see **INSURANCE** vol 25 (2003 Reissue) PARAS 546-547.

2 As to legal assignment under the Law of Property Act 1925 s 136 see PARA 72 et seq.

3 *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68 at [75], [2001] QB 825 at [75], [2001] 3 All ER 257 at [75] per Mance LJ.

4 See eg *Peters v General Accident Fire and Life Insurance Corp'n Ltd* [1937] 4 All ER 628, 59 Ll L Rep 148; affd [1938] 2 All ER 267, 36 LGR 583 (motor insurance policy could not be assigned); and **INSURANCE** vol 25 (2003 Reissue) PARA 720.

5 As to the rules for a valid assignment of a fire insurance policy see **INSURANCE** vol 25 (2003 Reissue) PARA 624.

6 See the Policies of Assurance Act 1867 s 1; and **INSURANCE** vol 25 (2003 Reissue) PARA 548 et seq.

7 See the Marine Insurance Act 1906 ss 50, 51; and **INSURANCE** vol 25 (2003 Reissue) para 389.

8 Ie the Law of Property Act 1925 s 136: see PARA 72 et seq.

9 The Law of Property Act 1925 s 136(2) specifically provides that it does not affect the provisions of the Policies of Assurance Act 1867; thus a life policy may be assigned either under the Law of Property Act 1925 s 136 or under the Policies of Assurance Act 1867. Additionally, it has been held that a marine policy can be assigned either under the Law of Property Act 1925 s 136 or under the Marine Insurance Act 1906 s 50: see *Williams v Atlantic Assurance Co* [1933] 1 KB 81, CA, and *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257, where in each case the Court of Appeal considered separately whether an assignment met the requirements of the Law of Property Act 1925 s 136 or of the Marine Insurance Act 1906 s 50.

10 See generally **INSURANCE**. As to statutory subrogation under the Third Parties (Rights against Insurers) Act 1930 see PARA 90.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSES/21. Transfer of intellectual property rights.

## 21. Transfer of intellectual property rights.

The Copyright, Designs and Patents Act 1988 provides that the copyright in every original literary, dramatic, musical or artistic work and in sound recordings, films or broadcasts and the typographical arrangement of published editions may be assigned in writing signed by or on behalf of the owner of the right<sup>1</sup>. Unregistered design right under the 1988 Act may be assigned in the like manner<sup>2</sup>, as may performer's property rights<sup>3</sup>. Moral rights, however, are not assignable<sup>4</sup>; nor are artist's resale rights<sup>5</sup>.

The Registered Designs Act 1949 does not prescribe any manner in which registered designs are to be assigned, but accepts that they are assignable<sup>6</sup>.

The Trade Marks Act 1994 provides that a registered trade mark, and an application for the registration of a trade mark, may be assigned, either in connection with the goodwill of a business or independently, in writing signed by or on behalf of the assignor<sup>7</sup>. Nothing in that Act is, however, to be construed as affecting the assignment or other transmission of an unregistered trade mark as part of the goodwill of a business<sup>8</sup>.

European Community law provides that in general<sup>9</sup> an assignment of a Community trade mark<sup>10</sup> must be made in writing and requires the signature of the parties to the contract, except when it is a result of a judgment; otherwise it is void<sup>11</sup>.

Where the legislation referred to above makes provision for the legal assignment of an intellectual property right, that provision applies and the provisions of the Law of Property Act 1925 with regard to legal assignment<sup>12</sup> do not apply<sup>13</sup>.

As previously discussed, patents are specifically stated not to be things in action<sup>14</sup>. However, the Patents Act 1977 makes provision for the assignment of patents, patent applications, and rights in patents and patent applications<sup>15</sup>.

Intellectual property rights are discussed in detail elsewhere in this work<sup>16</sup>.

1 See the Copyright, Designs and Patents Act 1988 ss 1(1), 90(1), (3) (s 1(1) amended by SI 2003/2498). No particular form of words is required (*Cray Valley v Deltech Europe Ltd* [2003] EWHC 728 (Ch) at [68]-[69], [2003] All ER (D) 315 (Apr) at [68]-[69] per Jacobs J) and notice is not required to perfect the assignment (*Performing Right Society Ltd v London Theatre of Varieties Ltd* [1924] AC 1, HL). As to the extent and operation of the assignment see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 160 et seq. A licence to print and publish contained in a publishing agreement is of a personal character and is not assignable, unless otherwise agreed, without the author's consent: see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 178.

2 See the Copyright, Designs and Patents Act 1988 s 222(1), (3); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 522-524. As to unregistered design right see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 501 et seq. As to unregistered Community designs as objects of property see EC Council Regulation 6/2002 on Community Designs (OJ L3, 5.1.2002, p 1), arts 27-34.

3 See the Copyright, Designs and Patents Act 1988 s 191B(1), (3) (added by SI 1996/2967); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 637-638. As to performer's property rights see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 633 et seq.

4 See the Copyright, Designs and Patents Act 1988 s 94; and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 483. As to moral rights see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARAS 7, 455 et seq.

5 See the Artist's Resale Right Regulations 2006, SI 2006/346, reg 7(1); and **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 785. As to resale rights see **COPYRIGHT, DESIGN RIGHT AND RELATED RIGHTS** vol 9(2) (2006 Reissue) PARA 774 et seq.

6 See the Registered Designs Act 1949 s 19(1), which provides for the registration of assignments; and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 700. As to registered designs see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 681 et seq. As to registered Community designs as objects of property see EC Council Regulation 6/2002 on Community Designs (OJ L3, 5.1.2002, p 1), arts 27-34; and as to Community designs see **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 773 et seq.

7 See the Trade Marks Act 1994 ss 24(1), (3), 27(1); and **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 129. As to registered trade marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 2 et seq.

8 Trade Marks Act 1994 s 24(6).

9 *le* without prejudice to EC Council Regulation 40/94 on the Community trade mark (OJ L11, 14.1.94, p 1) art 17(2) (which provides that a transfer of the whole of the undertaking includes the transfer of the Community trade mark except where, in accordance with the law governing the transfer, there is agreement to the contrary or circumstances clearly dictate otherwise). Article 17(2) applies to the contractual obligation to transfer the undertaking: art 17(2). The word 'whole' in art 17(2) must be interpreted in a common sense manner, and it is immaterial if the transfer is subject to one or two express exceptions or if the parties transferred the beneficial ownership of parallel UK trade marks but failed to transfer the bare legal title: *My Fotostop Ltd v Fotostop Group Ltd* [2006] EWHC 2729 (Ch), [2007] FSR 453.

10 As to the meaning of 'Community trade mark' see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 206; and as to the application of these provisions to applications for Community trade marks see **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 271.

11 EC Council Regulation 40/94 (OJ L11, 14.1.94, p 1) art 17(3). See further **TRADE MARKS AND TRADE NAMES** vol 48 (2007 Reissue) PARA 274.

12 *le* the provisions of the Law of Property Act 1925 s 136: see PARA 72 et seq.

13 In order for an assignment under the Law of Property Act 1925 s 136 to be successful, express notice in writing of the assignment must be given to the debtor: see s 136(1); and PARA 72. In the case of an intellectual property right, it is impossible to identify a debtor to whom such notice could be given.

14 See the Patents Act 1977 s 30(1); and PARA 12.

15 See the Patents Act 1977 s 30(1)-(7) (amended by SI 2004/2357); and **PATENTS AND REGISTERED DESIGNS** vol 79 (2008) PARA 373 et seq. See also *Siemens Schweiz AG v Thorn Security Ltd* [2008] EWCA Civ 1161, [2008] All ER (D) 211 (Oct) (meaning of 'assignment' in the Patents Act 1977 s 30(6)).

16 See the titles referred to in notes 1-15.

## UPDATE

### 21 Transfer of intellectual property rights

NOTES 9, 11--Regulation 40/94 replaced: EC Council Regulation 207/2009 (OJ L78, 24.3.2009, p 1); references to the repealed regulation should be construed as references to Regulation 207/2009 and read in accordance with the correlation table in Annex II: art 166.



Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSSES/22. Assignment of bills of lading.

## **22. Assignment of bills of lading.**

Bills of lading are assignable, and an assignee by virtue of becoming the holder of a bill has transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to that contract<sup>1</sup>.

<sup>1</sup> See the Carriage of Goods by Sea Act 1924 s 2; and **CARRIAGE AND CARRIERS** vol 7 (2008) PARA 338 et seq. An assignment of a bill of lading may, according to the intention of the parties, operate to pass the possession only, and not the ownership, of the goods: *Burgos v Nascimento, McKeand, Claimant* (1908) 100 LT 71.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(3) PROVISIONS FOR THE ASSIGNMENT OF SPECIFIC CHOSSES/23. Assignment of leases etc.

### **23. Assignment of leases etc.**

An assignment is ineffective to pass the legal estate in leasehold premises unless it is made by deed<sup>1</sup>. The assignment of leases and the transfer of the benefits and burdens of covenants contained in leases are discussed in detail elsewhere in this work<sup>2</sup>.

A notice served on an undertenant or lodger by a superior landlord where the rent of the immediate tenant is in arrear<sup>3</sup> operates as a statutory assignment of the chose in action, namely the right to be paid the undertenant's or lodger's rent<sup>4</sup>.

1 See the Law of Property Act 1925 s 52(1); **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) para 14; and **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) para 549.

2 See **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) para 547 et seq.

3 If a notice served under the Law of Distress Amendment Act 1908 s 6 (prospectively repealed): see **DISTRESS** vol 13 (2007 Reissue) PARA 960.

4 *Wallrock v Equity and Law Life Assurance Society* [1942] 2 KB 82 at 84, [1942] 1 All ER 510 at 511, CA, per Lord Greene MR; *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1989] 1 All ER 1161, [1989] 1 WLR 800, CA.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an  
 Equitable Assignment/24. Recognition of assignment in equity.

## **(4) EQUITABLE ASSIGNMENTS**

### **(i) What amounts to an Equitable Assignment**

#### **24. Recognition of assignment in equity.**

From the earliest times courts of equity have always permitted and given effect to assignments of all kinds of choses or things in action when the assignment is made for valuable consideration and is not contrary to public policy<sup>1</sup>.

<sup>1</sup> *Warmstrey v Tanfield* (1628) 1 Rep Ch 29; *Goring v Bickerstaff* (1662) 1 Cas in Ch 4 at 8; *Anon* (1667-1672) Freem Ch 145; *Wyn v Squib* (1717) 1 P Wms 378; *Row v Dawson* (1749) 1 Ves Sen 331, 1 White & Tud LC (9th Edn) 87; *Wright v Wright* (1750) 1 Ves Sen 409; *Whitfield v Fausset* (1750) 1 Ves Sen 387; *Burn v Carvalho* (1839) 4 My & Cr 690; *Prosser v Edmonds* (1835) 1 Y & C Ex 481; *Re Clarke, Coombe v Carter* (1887) 36 ChD 348, CA; *Fitzroy v Cave* [1905] 2 KB 364 at 372, CA. See also *Glegg v Bromley* [1912] 3 KB 474, CA; *German v Yates* (1915) 32 TLR 52; *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA. A person may charge his present and future income but possibly not his whole estate: *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/25. Modes of assignment of choses in action in equity.

## 25. Modes of assignment of choses in action in equity.

Apart from assignments in the narrower sense of express transfers, with which this title is primarily concerned, it should be observed that another person may become entitled in equity to a chose or thing in action by other means than express transfer<sup>1</sup>. First, the owner of the chose in action may declare that he holds it in trust for another<sup>2</sup>. Secondly, the owner may enter into a contract for valuable consideration to assign to another<sup>3</sup>. Thirdly, a beneficiary under a trust may direct the trustees henceforward to hold the trust property on trust for another instead of for him<sup>4</sup>.

<sup>1</sup> *Re Chrimes, Locovich v Chrimes* [1917] 1 Ch 30; *Timpson's Executors v Yerbury* [1936] 1 KB 645, [1936] 1 All ER 186, CA.

<sup>2</sup> *Milroy v Lord* (1862) 4 De GF & J 264; *Re Turcan* (1888) 40 ChD 5 at 10, CA, per Cotton LJ; *Carter v Hungerford* [1917] 1 Ch 260. An attempted assignment by transfer, which fails as a transfer, cannot, however, be treated as a declaration of trust: *Antrobus v Smith* (1805) 12 Ves 39; *Searle v Law* (1846) 15 Sim 95; cf *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396, CA. The strict application of the principle, laid down in *Milroy v Lord* (1862) 4 De GF & J 264, that a trust is only completely constituted by an effective transfer of the trust property to trustees or by a declaration of trust by the settlor has been modified by *T Choithram International SA v Pagarani* [2001] 2 All ER 492, [2001] 1 LRC 694, PC (considered in *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075). See further **GIFTS** vol 52 (2009) PARA 269. As to covenants in settlements to settle after-acquired property see **SETTLEMENTS**. As to the creation of trusts see **TRUSTS** vol 48 (2007 Reissue) PARA 601 et seq.

<sup>3</sup> The equitable interest in a share may pass under a contract of sale even if the contract has not been completed by registration: *Hawks v McArthur* [1951] 1 All ER 22, [1950] WN 581; *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075.

<sup>4</sup> This probably operates by way of trust rather than assignment: see *Grey v IRC* [1958] Ch 375 at 381, [1958] 1 All ER 246 at 250-251 per Upjohn J; on appeal [1958] Ch 690 at 710-711, [1958] 2 All ER 428 at 434, CA, per Lord Evershed MR, and at 722 and 441 per Ormerod LJ; affd [1960] AC 1 at 16, [1959] 3 All ER 603 at 608, HL, per Lord Radcliffe. See also *Re Tyler's Fund Trusts, Graves v King* [1967] 3 All ER 389, [1967] 1 WLR 1269. Possibly a creditor can similarly direct his debtor to hold the debt on trust for another: see *M'Fadden v Jenkyns* (1842) 1 Hare 458 (affd 1 Ph 153); and JC Hall 'Gift of Part of a Debt' [1959] CLJ 99 at 108-109.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/26. Equitable assignment by way of charge.

## 26. Equitable assignment by way of charge.

Unlike assignments under the Law of Property Act 1925<sup>1</sup>, equitable assignments may be conditional or by way of charge<sup>2</sup>. These categories overlap, for an assignment by way of charge is commonly subject to the condition subsequent that it will determine when a debt owed by the assignor to the assignee is repaid. Assignments by way of charge are founded in contract<sup>3</sup>. Thus a document directing payment to a third person of money due under a contract may amount to an absolute assignment in equity or, having regard to the circumstances of the case and the tenor of the document, may constitute an equitable charge<sup>4</sup>, or may amount to a revocable mandate, as, for example, when the payment is directed by the party to whom it is due to a banker for crediting to his account<sup>5</sup>, and is not expressed to be irrevocable<sup>6</sup>.

Strictly speaking a charge over a chose in action creates a new interest, rather than transferring an existing interest<sup>7</sup>.

1    le the Law of Property Act 1925 s 136(1): see PARA 72.

2    *Durham Bros v Robertson* [1898] 1 QB 765, CA; *Re Welsh Irish Ferries Ltd* [1986] Ch 471, [1985] 3 WLR 610; *Annangel Glory Cia Naviera SA v M Golodetz Ltd, The Annangel Glory* [1988] 1 Lloyd's Rep 45. A charge on a fund belonging at law to someone else operates as a partial equitable assignment: *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 All ER 987, [1995] 1 WLR 1140, PC. See also PARA 37 text and note 22.

3    *Re Earl of Lucan, Hardinge v Cobden* (1890) 45 ChD 470.

4    *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638; and see *Walter and Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 843, CA. Distinguish *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, CA (cited in PARA 79) and *Re Marwalt Ltd* [1992] BCC 32. Registration of equitable charges created by companies on book debts is required by the Companies Act 1985 ss 395-398 (prospectively substituted by the Companies Act 1989 ss 93-95; repealed as from 1 October 2009 and replaced by provisions of the Companies Act 2006 ss 860, 861, 863, 864, 866, 867, 870, 874): see **COMPANIES** vol 15 (2009) PARA 1296 et seq. See also *Lloyds and Scottish Finance Ltd v Cyril Lord Carpets Sales Ltd* [1992] BCLC 609, HL (whether assignments absolute or by way of charge).

5    *Bell v London and North Western Rly Co* (1852) 15 Beav 548; and see PARA 38.

6    Cf *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638.

7    There is, however, authority to the contrary: see *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 All ER 987 at 991-992, [1995] 1 WLR 1140 at 1144, PC.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/27. Assignment of part of a chose in action.

## **27. Assignment of part of a chose in action.**

Unlike an assignment under the Law of Property Act 1925<sup>1</sup> there may, in equity, be a valid assignment of a portion of a specified fund or a part of a debt<sup>2</sup>.

<sup>1</sup>    le under the Law of Property Act 1925 s 136: see PARA 72 et seq.

<sup>2</sup>    *Brice v Bannister* (1878) 3 QBD 569, CA; *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA, per Chitty LJ; *Yeates v Groves* (1791) 1 Ves 280; *Re Row, ex p South* (1818) 3 Swan 392; *Re Steel Wing Co Ltd* [1921] 1 Ch 349; and see PARA 28 text and notes 9-10. See also *Forster v Baker* [1910] 2 KB 636 at 641, CA (a case of a judgment debt involving rights of execution which the Court of Appeal held could not be sub-divided); *Hughes v Pump House Hotel Co* [1902] 2 KB 190 at 195, CA, per Matthew LJ. In *Bank of Liverpool and Martins Ltd v Holland* (1926) 43 TLR 29, an assignment of a debt which limited the amount to a certain sum was held to be a good legal assignment on the ground that it was an assignment of the whole debt with a proviso that any excess above the certain sum must be held by the assignee as trustee for the assignor. See also JC Hall 'Gift of Part of a Debt' [1959] CLJ 99.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an  
 Equitable Assignment/28. Mode and form of assignment in general immaterial.

## 28. Mode and form of assignment in general immaterial.

No form of words is required for an equitable assignment; the only thing that is necessary is to make the meaning plain<sup>1</sup>. The assignment may be by word of mouth<sup>2</sup>, unless in the particular case writing is required by law<sup>3</sup>, and no particular form of words is necessary so long as the words clearly show an intention that the assignee is to have the benefit of the chose or thing in action<sup>4</sup>. There must, however, be some act by the assignor showing that he is passing the chose in action to the supposed assignee<sup>5</sup>. An actual intention not to assign an interest will not prevent an assignment being effective if the parties have contracted to do an act which in law constitutes an assignment<sup>6</sup>. The assignment may be addressed either to the debtor or to the assignee<sup>7</sup>. An agreement amounting to an equitable assignment may be express and written or may even be made out from a course of dealing between the parties<sup>8</sup>.

An engagement or direction to pay a sum of money out of a specified debt or fund constitutes an equitable assignment, though not of the whole debt or fund<sup>9</sup>; but it is necessary to specify the debt or fund<sup>10</sup>. A mere charge on a debt or fund also operates as a partial equitable assignment<sup>11</sup>.

It is immaterial that the amount of the debt assigned is not ascertained at the date of the assignment<sup>12</sup>.

1 *German v Yates* (1915) 32 TLR 52 at 53 per Lush J; *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543, HL; *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248; and see *Morgan v Larivière* (1875) LR 7 HL 423. In the case of a voluntary equitable assignment equity has applied a benevolent construction to words of gift: *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075.

2 *Riccard v Prichard* (1855) 1 K & J 277; *Brown, Shipley & Co v Kough* (1885) 29 ChD 848 at 854, CA; *Lee v Magrath* (1882) 10 LR Ir 45 at 49 (revsd without affecting this point 10 LR Ir 313, CA); *Tibbits v George* (1836) 5 Ad & El 107; *Gurnell v Gardner* (1863) 4 Giff 626; *Heath v Hall* (1812) 4 Taunt 326; and cf *London and Yorkshire Bank Ltd v White* (1895) 11 TLR 570, DC.

3 See PARA 29.

4 *Row v Dawson* (1749) 1 Ves Sen 331, 1 White & Tud LC (9th Edn) 87; *Chowne v Baylis* (1862) 31 Beav 351; *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462, HL, per Lord Macnaghten; and see *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128 at 134, CA; *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408 at 412; *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543, HL; *Re Casey's Patents, Stewart v Casey* [1892] 1 Ch 104 at 118, CA, per Fry LJ; *Re Wale, Wale v Harris* [1956] 3 All ER 280, [1956] 1 WLR 1346; *Letts v IRC* [1956] 3 All ER 588, [1957] 1 WLR 201; *Re Miller Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703; *Re Tyler's Fund Trusts, Graves v King* [1967] 3 All ER 389, [1967] 1 WLR 1269; *Malayawata Steel Berhad v Government of the Federation of Malaysia* (12 May 1980, unreported), PC; *Winn v Burgess* (1986) Times, 8 July, CA.

5 *Kijowski v New Capital Properties Ltd* (1987) 15 ConLR 1 (answer to inquiries before contract about NHBC agreement not an assignment of vendor's rights under the agreement).

6 *Re Gillott's Settlement, Chattock v Reid* [1934] Ch 97 (assignment held to incur a forfeiture, which the parties had sought to avoid); *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548, [1979] 2 All ER 853; and see PARA 30. Cf the approach of the courts to the question whether a tenancy or a licence has been created: see eg *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL.

7 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462, HL, per Lord Macnaghten.

8 *Brown, Shipley & Co v Kough* (1885) 29 ChD 848 at 854, 866, CA.

9 *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA, per Chitty LJ; *Yeates v Groves* (1791) 1 Ves 280; *Re Row, ex p South* (1818) 3 Swan 392.

10 *Percival v Dunn* (1885) 29 ChD 128; *Burn v Carvalho* (1839) 4 My & Cr 690; *Rodick v Gandell* (1851) 1 De GM & G 763; *Brice v Bannister* (1878) 3 QBD 569 at 577, CA, per Cotton LJ; *Yeates v Groves* (1791) 1 Ves 280; *Watson v Duke of Wellington* (1830) 1 Russ & M 602; *Diplock v Hammond* (1854) 5 De GM & G 320; *Re Gunsbourg, ex p Trustee* (1919) 88 LJB 479, CA; *Ratner v London Joint City and Midland Bank* (1922) 38 TLR 253; *Palmer v Carey* [1926] AC 703, PC; *Swiss Bank Corp v Lloyds Bank Ltd* [1982] AC 584 at 613, [1981] 2 All ER 449 at 453, HL, per Lord Wilberforce; *Flightline Ltd v Edwards* [2003] EWCA Civ 63, [2003] 3 All ER 1200, [2003] 1 WLR 1200.

11 *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA. For the principle that an assignment, in order to be within the Law of Property Act 1925, must be absolute and not by way of charge see PARA 76. As to equitable assignments by way of charge see PARA 26; and **MORTGAGE** vol 77 (2010) PARA 106.

12 *Crowfoot v Gurney* (1832) 9 Bing 372 at 376.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/29. When writing is required.

## 29. When writing is required.

A disposition of an equitable interest or trust subsisting at the time of the disposition is required by statute to be in writing, signed by the disponent or his duly authorised agent<sup>1</sup>. The requirement applies not only to an assignment by direct transfer, but also to an assignment by means of a direction by an equitable owner to trustees to hold on trust for another<sup>2</sup>.

A contract for the sale or other disposition of a chose or thing in action which constitutes an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each<sup>3</sup>. If the statutory requirements are not complied with the purported contract is a nullity.

1 See the Law of Property Act 1925 s 53(1)(c); and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 24, 148. Where the assignee is to hold in a fiduciary capacity, there is no need for the writing to comprise particulars of the trust: *Re Tyler's Fund Trusts*, *Graves v King* [1967] 3 All ER 389, [1967] 1 WLR 1269.

2 *Grey v IRC* [1960] AC 1, [1959] 3 All ER 603, HL. It is thought the statutory requirement does not normally apply where the owner of a chose in action declares himself a trustee of it: see Underhill and Hayton's Law of Trusts and Trustees (17th Edn) 232. As to whether it applies to a contract for valuable consideration to assign a chose in action see *Oughtred v IRC* [1960] AC 206, [1959] 3 All ER 623, HL. See also *Re Tyler's Fund Trusts*, *Graves v King* [1967] 3 All ER 389, [1967] 1 WLR 1269; *Vandervell v IRC* [1967] 2 AC 291, [1967] 1 All ER 1, HL; and **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARA 24.

3 Law of Property (Miscellaneous Provisions) Act 1989 s 2(1). See further s 2(2)-(7) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 4; and by SI 2001/3649; SI 2006/2383); and see PH Pettit 'Farewell Section 40' [1989] Conv 431. Cf *Re Whitting, ex p Hall* (1879) 10 ChD 615, CA (assignment of future rents from land).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an  
 Equitable Assignment/30. Future choses in action.

### 30. Future choses in action.

It is impossible, even in equity, to assign a chose or thing in action which is not yet in existence<sup>1</sup>. A contract for valuable consideration to assign a future chose in action if and when it comes into existence and comes into the hands of the assignor is, however, valid<sup>2</sup> and a purported present assignment of such a chose in action will be construed and given effect as such a contract in equity, provided valuable consideration is present<sup>3</sup>. It will bind the conscience of the assignor, and bind the subject matter of the contract when it comes into existence, provided that the subject matter is of such a nature and so described as to be capable of being identified<sup>4</sup>. The rights of the assignee do not rest merely in contract. The property is bound in equity directly it is acquired by the assignor, automatically and without any further act on his part<sup>5</sup>. An assignment in such circumstances will be effective even if the actual intention of the parties, in order to avoid a forfeiture of the interest, was that there should not be an assignment<sup>6</sup>.

1 *Collyer v Isaacs* (1881) 19 ChD 342 at 351, CA, per Jessel MR; *Annangel Glory Cia Naviera SA v M Golodetz Ltd, The Annangel Glory* [1988] 1 Lloyd's Rep 45. This is all the more so at law. See also *Re Parsons, Stockley v Parsons* (1890) 45 ChD 51 at 56; *Re Mudge* [1914] 1 Ch 115, CA. See MC Cullity and HAJ Ford (1966) 30 Conv 286.

2 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 533, 543, HL (where an assignment of all future book debts was held not too vague); *Brown v Tanner* (1868) 3 Ch App 597 (future freight); *Re Irving, ex p Brett* (1877) 7 ChD 419 (future dividends in bankruptcy); *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462 (future patent rights); *Re Pyle Works* (1890) 44 ChD 534, CA (uncalled capital); *Glegg v Bromley* [1912] 3 KB 474, CA (damages recoverable by assignor in action pending at time of assignment); *Imperial Paper Mills of Canada v Quebec Bank* (1913) 83 LJPC 67 (mortgage of timber 'in and on the banks of the Sturgeon River and tributaries and are the following, '40,000 cords of log'); *Horwood v Millar's Timber and Trading Co Ltd* [1916] 2 KB 44 at 48 per Lush J and at 53 per Sankey J (affd on other grounds [1917] 1 KB 305, CA) (salary to become due to assignor); *Syrett v Egerton* [1957] 3 All ER 331, [1957] 1 WLR 1130, DC (assignment by way of charge of all a man's future income); cf *Holroyd v Marshall* (1862) 10 HL Cas 191; *Langton v Horton* (1842) 1 Hare 549; *Addison v Cox* (1872) 8 Ch App 76; *Re Clarke, Coombe v Carter* (1887) 36 Ch D 348, CA; *Robinson v Bavasor* (1734) 2 Eq Cas Abr 90; *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA (where an indorsement on a life insurance policy authorising the alleged assignee to draw the insurance money if the assignor predeceased her was held not to constitute present words of gift); *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA; *Malayawata Steel Berhad v Government of the Federation of Malaysia* (12 May 1980, unreported), PC; *Annangel Glory Cia Naviera SA v M Golodetz Ltd, The Annangel Glory* [1988] 1 Lloyd's Rep 45; *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150; *Elders Pastoral Ltd v Bank of New Zealand (No 2)* [1990] 1 WLR 1478; *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257. See also *Wu Koon Tai v Wu Yau Loi* [1997] AC 179, [1996] 3 WLR 778, PC.

3 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697; *German v Yates* (1915) 32 TLR 52 at 53 per Lush J, explaining *Glegg v Bromley* [1912] 3 KB 474 at 491, CA; *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920; *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193; *Re Adlard, Taylor v Adlard* [1954] Ch 29, [1953] 2 All ER 1437; and see also PARA 31. As to fraudulent preference, deeds of assignment for benefit of creditors and registration of charges on book debts in the case of companies see **COMPANIES** vol 15 (2009) PARA 1270. An assignment of a chose in action may possibly require registration as a bill of sale: see the Bills of Sale Act 1878 s 4; *Jarvis v Jarvis* (1893) 63 LJ Ch 10; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 1672.

4 *Tailby v Official Receiver* (1888) 13 App Cas 523 at 543, HL; cf *Flower v Buller* (1880) 15 ChD 665; *Re Coleman, Henry v Strong* (1888) 39 ChD 443, CA; *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920; *Re Gillott's Settlement, Chattock v Reid* [1934] Ch 97.

5 *Re Lind, Industrials Finance Syndicate Ltd v Lind* [1915] 2 Ch 345, CA; *Pharaoh's Plywood Co Ltd v Allied Wood Products Co (Pte) Ltd* [1980] LS Gaz R 130, CA; *Coleridge v Taylor* (25 October 1984, unreported), QBD. See also *Re Poulter, Poulter v Poulter, Edwards v Poulter* (1912) 56 Sol Jo 291.

6 *Re Gillott's Settlement, Chattock v Reid* [1934] Ch 97; *Swiss Bank Corp v Lloyds Bank Ltd* [1979] Ch 548, [1979] 2 All ER 853.

This paragraph as set out in the previous edition of this title was cited (though referred to by an incorrect paragraph number (33) in that edition) as correctly stating the law in *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/31. Distinction between existing and future choses in action.

### **31. Distinction between existing and future choses in action.**

It is not always easy to distinguish between existing and future choses or things in action. On the one hand an expectancy or spes successionis is clearly future property<sup>1</sup>, and on the other hand an existing contractual right to be paid money at a future date is a present chose in action<sup>2</sup>. The position is less clear where there is an existing contract but it is uncertain whether the obligation will ever arise<sup>3</sup>. It is, however, clear that the proceeds of an existing chose in action to arise in the future constitute a separate and future chose in action<sup>4</sup>.

1 See the cases cited in PARA 30 note 2.

2 See *Norman v Federal Taxation Comr* (1963) 109 CLR 9 at 26, [1964] ALR 131 at 146, Aust HC, per Windeyer J; and see also per Menzies J at 21 and 143 for the suggestion that a future chose in action which can only be the subject of a contract to assign in equity may, perhaps, be the subject of an actual assignment under the Law of Property Act 1925 s 136 (see PARA 72 et seq). See also *G & T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 605; affd 44 TLR 758, CA.

3 In *Norman v Federal Taxation Comr* (1963) 109 CLR 9, [1964] ALR 131, Aust HC, a majority of the court held that future interest on a loan repayable at any time without notice was a future chose in action.

4 *Glegg v Bromley* [1912] 3 KB 474, CA (right of action for slander was an existing chose in action; damages hoped for was a separate future chose in action); *Shepherd v Taxation Comr of the Commonwealth of Australia* (1965) 113 CLR 385, [1966] ALR 969 (existing right to future royalties distinguished from royalties themselves as future property); *Williams v IRC* [1965] NZLR 395; *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/32. Communication to assignee of assignment.

### 32. Communication to assignee of assignment.

An equitable assignment carried out by means of a direction to the debtor or trustee does not become binding as between the assignor and assignee unless it is made in pursuance of a prior agreement with the assignee, or until it is communicated to the assignee<sup>1</sup>; and until the assignment becomes binding, it may be revoked by the assignor. Where the assignment is in the form of a direct transfer by the assignor to the assignee there is a conflict of authority as to whether the assignment can be complete before communication to the assignee<sup>2</sup>. Where an equitable assignment was effected by means of a letter, and notice of this assignment was at the same time sent by letter to the assignee, the assignment was held to be complete from the date of the posting of the letters<sup>3</sup>.

1 *Re Hamilton, FitzGeorge v FitzGeorge* (1921) 124 LT 737, CA; *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, CA; *Rekstin v Severo Sibirsko Gosudarstvennoe Akcionerhoe Obschestvo Komsever Putj and Bank for Russian Trade Ltd* [1933] 1 KB 47, CA.

2 There is a clear statement by Lord Wright MR, in *Timpson's Executors v Yerbury* [1936] 1 KB 645 at 658, [1936] 1 All ER 186 at 190, CA, that communication is required; and see *Morrell v Wootten* (1852) 16 Beav 197; cf *Shamia v Joory* [1958] 1 QB 448 at 460, [1958] 1 All ER 111 at 115. If communication is necessary, choses in action are an exception to the general principle that a transfer of property in proper form to a person without his knowledge vests the property in him at once, subject to his right to repudiate it when he hears of it; as to this principle see *Siggers v Evans* (1855) 5 E & B 367; *Standing v Bowring* (1885) 31 ChD 282, CA; *London and County Banking Co v London and River Plate Bank* (1888) 21 QBD 535, CA; *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075; and **GIFTS**. There was no communication in *Re Way's Trusts* (1864) 2 De GJ & Sm 365; *Re Lake, ex p Cavendish* [1903] 1 KB 151; *Wigan v English and Scottish Law Life Assurance Association* [1909] 1 Ch 291 (in the last two cases the assignee's claim failed on other grounds).

3 *Alexander v Steinhardt, Walker & Co* [1903] 2 KB 208.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an  
 Equitable Assignment/33. Consideration, and voluntary assignment of an equitable chose in  
 action.

### **33. Consideration, and voluntary assignment of an equitable chose in action.**

An assignment of an equitable chose or thing in action will be enforced, even though voluntary, provided that the donor has done everything required to be done by him<sup>1</sup> in order to transfer the debt or fund<sup>2</sup>.

<sup>1</sup> See PARA 35.

<sup>2</sup> *Kekewich v Manning* (1851) 1 De GM & G 176; *Voyle v Hughes* (1854) 2 Sm & G 18; *Harding v Harding* (1886) 17 QBD 442, DC; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Re Williams, Williams v Ball* [1917] 1 Ch 1 at 8, CA, per Warrington LJ; *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104. See also *Re King, Sewell v King* (1879) 14 ChD 179; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82, CA; *Nanney v Morgan* (1887) 37 ChD 346, CA; *Paul v Paul* (1882) 20 ChD 742, CA; *Re Rose, Midland Bank Executor and Trustee Co Ltd v Rose* [1949] Ch 78, [1948] 2 All ER 971; *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA; *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA; *Letts v IRC* [1956] 3 All ER 588, [1957] 1 WLR 201. An assignment may be valid, even though it is voluntary, if it is within the Law of Property Act 1925 s 136(1): see PARA 77. See further **GIFTS** vol 52 (2009) PARA 225.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an  
 Equitable Assignment/34. Consideration and voluntary assignment of a legal chose in action.

### **34. Consideration and voluntary assignment of a legal chose in action.**

Consideration is not required to support the equitable assignment of an existing legal chose or thing in action<sup>1</sup>, provided that the assignor has done everything required to be done by him<sup>2</sup> to make the assignment complete in equity<sup>3</sup>.

1 There appears to be no doubt that a disposition of a legal chose in action is valid, even in the absence of valuable consideration, if it is made by way of declaration of trust and not by way of direct assignment, since it is a general principle that where a trust has been completely constituted it is enforced whether there is consideration or not: see eg *Ellison v Ellison* (1802) 6 Ves 656; *M'Fadden v Jenkyns* (1842) 1 Hare 458 (on appeal 1 Ph 153); 33 Canadian Bar Review 284; and see **TRUSTS** vol 48 (2007 Reissue) PARA 604.

2 See PARA 35.

3 *Fortescue v Barnett* (1834) 3 My & K 36; *Pearson v Amicable Assurance Office* (1859) 27 Beav 229; *Re King, Sewell v King* (1879) 14 ChD 179; *Re Patrick, Bills v Tatham* [1891] 1 Ch 82, CA; *Harding v Harding* (1886) 17 QBD 442, DC; *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404; *Spellman v Spellman* [1961] 2 All ER 498 at 500-501, [1961] 1 WLR 921 at 925, CA, per Danckwerts LJ; *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA; *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075. See also PARAS 35, 37 text and note 24. Contrast *Glegg v Bromley* [1912] 3 KB 474 at 491, CA, per Lord Parker, explained in *German v Yates* (1915) 32 TLR 52; *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104; *Sycamore Sandpits Developments Ltd v Phoenix Assurance Co Ltd* (23 May 1986, unreported), QBD. Cf *Re McArdle* [1951] Ch 669 at 673-674, [1951] 1 All ER 905 at 907-908, CA, per Sir Raymond Evershed MR (where *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404 was not cited). See also 59 LQR 58, 129, 208; 67 LQR 295; 33 Canadian Bar Review 284. The view in the text is that taken in New Zealand (*Pulley v Public Trustee* [1956] NZLR 771) and Australia (*Norman v Federal Taxation Comr* (1963) 109 CLR 9, [1964] ALR 131, Aust HC; *Shepherd v Taxation Comr of the Commonwealth of Australia* (1965) 113 CLR 385, [1966] ALR 969, Aust HC).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/35. Rule that the assignor must have done everything necessary to transfer title to the assignee.

**35. Rule that the assignor must have done everything necessary to transfer title to the assignee.**

The assignor must have done everything required to be done by him to make the assignment complete in equity<sup>1</sup>. Where it is claimed that an assignment in equity of causes of action takes effect at a particular time there has to be some outward expression by the assignor of his intention to make an immediate disposition of the subject matter of the assignment. It must be possible to identify some act on the assignor's part from which his intention can be inferred then and there to divest himself, in favour of the assignee, of the right or interest to be assigned, on the terms which have been agreed<sup>2</sup>.

It is thought, however, that the courts would not accept an argument that an incomplete legal assignment<sup>3</sup> cannot, since legal assignment became possible, take effect as an equitable assignment on the ground that the assignor could not be said to have done everything required to be done by him to make the assignment complete<sup>4</sup>.

1 See *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075 and the other cases cited in PARA 34 note 3.

2 *Finlan v Eyton Morris Winfield (a firm)* [2007] EWHC 914 (Ch), [2007] 4 All ER 143.

3 I.e. an incomplete assignment under the Law of Property Act 1925 s 136(1) (replacing the Supreme Court of Judicature Act 1873 s 25(6) (repealed)): see PARA 72.

4 For cases where there was held to have been a valid equitable assignment see *Harding v Harding* (1886) 17 QBD 442, DC; *German v Yates* (1915) 32 TLR 52; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404; *Sycamore Sandpits Developments Ltd v Phoenix Assurance Co Ltd* (23 May 1986, unreported), QBD; contrast *Lee v Magrath* (1882) 10 LR 1r 313, CA; *Olsson v Dyson* (1969) 120 CLR 365, 43 ALJR 77, Aust HC.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/36. Consideration and contracts to assign.

### **36. Consideration and contracts to assign.**

An assignment of future property can only operate as a contract to assign when the property comes into existence, and consideration is therefore needed<sup>1</sup>, even though the assignment is made by deed<sup>2</sup>. Similarly, consideration is required for a contract to assign even a present chose or thing in action in the future<sup>3</sup> and also if the assignment is by way of charge and not absolute, because the rights of the assignee are in such a case founded in contract<sup>4</sup>.

1 *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697; *Glegg v Bromley* [1912] 3 KB 474, CA; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 5, [1942] 1 All ER 404 at 408 per Atkinson J; *Re Brooks' Settlement Trusts, Lloyds Bank Ltd v Tillard* [1939] Ch 993, [1939] 3 All ER 920; *Re McArdle* [1951] Ch 669 at 674-675, [1951] 1 All ER 905 at 908, CA; *Winn v Burgess* (1986) Times, 8 July, CA. See also PARA 30.

2 *Meek v Kettlewell* (1842) 1 Hare 464 (affd (1843) 1 Ph 342); *Re Ellenborough, Towry Law v Burne* [1903] 1 Ch 697.

3 *Re McArdle* [1951] Ch 669, [1951] 1 All ER 905, CA; cf *Glegg v Bromley* [1912] 3 KB 474, CA; *Re Adlard, Taylor v Adlard* [1954] Ch 29, [1953] 2 All ER 1437; *Re Burton's Settlements, Scott v National Provincial Bank Ltd* [1955] Ch 82, [1954] 3 All ER 193.

4 *Re Earl of Lucan, Hardinge v Cobden* (1890) 45 ChD 470.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an  
 Equitable Assignment/37. Examples of equitable assignments.

### **37. Examples of equitable assignments.**

The following transactions are examples of good equitable assignments:

- 75 (1) an order given by an assignor to an assignee upon a third person to pay the assignee out of funds in his hands<sup>1</sup>, or which will come to his hands<sup>2</sup>;
- 76 (2) a direction by a person who has, or will have, funds in the hands of another to that other to pay out of them a sum to a third person, provided that the direction is communicated to the third person<sup>3</sup>;
- 77 (3) a letter by a creditor to a debtor requesting the latter to sign an undertaking (which is attached to the letter) to pay the debt to a third party, the documents being transmitted by the third party to the debtor<sup>4</sup>;
- 78 (4) an agreement between a builder and the guarantor of his overdraft that moneys to be received by the builder should be paid to solicitors to pay to the guarantor's account and applied in reduction of the builder's overdraft<sup>5</sup>;
- 79 (5) an agreement between a debtor and a creditor that the debt is to be paid out of a specific fund coming to the debtor<sup>6</sup>;
- 80 (6) a direction by an assignor to a person holding funds of the assignor, which was sent to a third party and notified by the third party to the fundholder, to pay the funds over to a third party<sup>7</sup>;
- 81 (7) a direction by the creditor to the debtor to pay money becoming due under the contract to the creditor's account at a specified bank, if the circumstances and tenor of the mandate lead to the conclusion that an equitable assignment, whether absolute or by way of security, is intended<sup>8</sup>;
- 82 (8) a request to a person having funds of the assignor to pay the assignee and charge to the assignor's account<sup>9</sup>;
- 83 (9) a clause in a sub-contract between a building contractor and a sub-contractor declaring that in certain events the building contractor would become trustee of a sum for the sub-contractor<sup>10</sup>;
- 84 (10) a request by the assignor that the assignee would, after the death of the assignor, erect a tombstone and pay for it out of certain life insurance moneys, coupled with the handing over to the assignee by the assignor of the policies of insurance<sup>11</sup>;
- 85 (11) a transfer of an interest in a personal contract and moneys receivable under it, although a contract of personal service is not assignable<sup>12</sup>;
- 86 (12) a declaration in writing by the assignor that he holds at the disposal of the assignee a sum due to him from a third party<sup>13</sup>;
- 87 (13) an undertaking to pay over to another moneys to be received from a particular source<sup>14</sup>;
- 88 (14) a memorandum, or certificate, under the seal of a building society, given to a lender, declaring that the property of the society is liable for the repayment of the loan<sup>15</sup>;
- 89 (15) a letter by the assignor or his solicitors directing them to take proceedings to recover a debt and to hold the proceeds at the disposal of the assignee, a copy of the letter being sent to the assignee<sup>16</sup>;
- 90 (16) the passing of the name of the assignee as that of the transferee of stock purchased on the London Stock Exchange by the assignor, even if the assignor dies before the transfers are completed<sup>17</sup>;

- 91 (17) the indorsing in blank and handing over of a debenture issued by a company<sup>18</sup>, or a banker's deposit receipt<sup>19</sup>, and the transfer of a deposit receipt into the joint names of the assignor and the assignees, the assignor intending that the beneficial interest in the money shall pass to himself and the assignees and, on the death of any of them, shall remain in the survivors<sup>20</sup>;
- 92 (18) a covenant to assign an expectancy or a spes successionis to the benefit of an indemnity<sup>21</sup>.

The crystallisation of a floating charge on the appointment of a receiver operates as an equitable assignment by way of charge of the property of the company to the debenture holder, including the rights of the company under an existing contract with a third party<sup>22</sup>.

The execution of a share transfer form<sup>23</sup> may operate as a valid equitable assignment of the shares prior to registration. It will clearly do so in the case of a transaction for value. Where the transaction is by way of gift, delivery of the transfer form to the transferee or the company is normally required but may be dispensed with in some circumstances<sup>24</sup>.

Where there is already in existence by operation of law, by virtue of the office, a fiduciary and equitable obligation to hold the benefit of a legal chose in action for an office holder's successors in title, that has been held to be a strong basis for an assumption that the intention is to effect an assignment in equity once that office holder comes to retire<sup>25</sup>.

1 *Re Row, ex p South* (1818) 3 Swan 392; *Diplock v Hammond* (1854) 5 De GM & G 320; *Jones v Farrell* (1857) 1 De G & J 208; *Burn v Carvalho* (1839) 4 My & Cr 690; *M'Gowan v Smith* (1856) 26 LJ Ch 8; *Fisher v Calvert* (1879) 27 WR 301; *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA; *Re Sheward, Sheward v Brown* [1893] 3 Ch 502. As to a direction to pay when no fund is indicated see PARA 38 note 1.

2 *Lett v Morris* (1831) 4 Sim 607; *Brice v Bannister* (1878) 3 QBD 569, CA; *Yeates v Groves* (1791) 1 Ves 280.

3 *Morrell v Wootten* (1852) 16 Beav 197; *Lambe v Orton* (1860) 1 Drew & Sm 125; *Alexander v Steinhardt, Walker & Co* [1903] 2 KB 208 (where it was held that the assignment took effect upon the posting of the letter containing the direction). See also *Fitzgerald v Stewart* (1831) 2 Russ & M 457; *Malcolm v Scott* (1843) 3 Hare 39 (subsequent proceedings (1850) 3 Mac & G 29); *Hutchinson v Heyworth* (1838) 9 Ad & El 375; *National Provincial and Union Bank of England v Lindsell* [1922] 1 KB 21.

4 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL. As to the question whether the assignment in this case was also an assignment under the provisions now re-enacted in the Law of Property Act 1925 s 136(1) see *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461, HL, per Lord Macnaghten.

5 *Re Warren, ex p Wheeler v Trustee in Bankruptcy* [1938] Ch 725, [1938] 2 All ER 331, DC.

6 *Rodick v Gandell* (1852) 1 De GM & G 763 at 777; *Riccard v Prichard* (1855) 1 K & J 277; *Re Dalton (a bankrupt), ex p Herrington and Carmichael (a firm) v The Trustee* [1963] Ch 336, [1962] 2 All ER 499, DC; and see *London and Yorkshire Bank Ltd v White* (1895) 11 TLR 570, DC. There must be an obligation in favour of the creditor to pay the debt out of the fund: *Flightline Ltd v Edwards* [2003] EWCA Civ 63, [2003] 3 All ER 1200, [2003] 1 WLR 1200.

7 *Harding v Harding* (1886) 17 QBD 442, DC, applied in *The Zigurds* (1931) 47 TLR 525 (direction to pay freight).

8 *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638; but compare and distinguish *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, CA.

9 *Webb v Smith* (1885) 30 ChD 192, CA.

10 *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178.

11 *Thomas v Harris* [1947] 1 All ER 444, CA.

12 *Shaw & Co v Moss Empires Ltd and Bastow* (1908) 25 TLR 190; *Russell & Co Ltd v Austin Fryers* (1909) 25 TLR 414, DC. See PARA 100.

- 13 *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128, CA.
- 14 *Re Irving, ex p Brett* (1877) 7 ChD 419 (dividends receivable in a particular bankruptcy); *West and Wright v Newing* (1900) 82 LT 260 (undertaking to indorse and hand over cheques from a particular source); *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703 (undertaking given by company to insurers in form of claim). A conditional promise to pay a debt when certain funds are received is not, however, an equitable assignment: *Field v Megaw* (1869) LR 4 CP 660; and see PARA 38 note 13.
- 15 *Baker v Landport and Mid-Somerset Benefit Building Society* (1912) 56 Sol Jo 224.
- 16 *Palmer v Culverwell, Brooks & Co* (1901) 85 LT 758 (where such an assignment was held good as against a trustee under a subsequent assignment for creditors).
- 17 See *Re Smith, Bull v Smith* (1901) 84 LT 835.
- 18 *Re Pryce, ex p Rensburg* (1877) 4 ChD 685; *Re Jenkinson, ex p Nottingham and Nottinghamshire Bank* (1885) 15 QBD 441, DC.
- 19 *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; and see *Moore v Ulster Banking Co* (1877) IR 11 CL 512. Cf *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104.
- 20 *McEaney v Shevlin* [1912] 1 IR 32; affd [1912] 1 IR 278, CA.
- 21 *Re Poulter, Poulter v Poulter, Edwards v Poulter* (1912) 56 Sol Jo 291.
- 22 *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1, [1973] 1 All ER 394, CA; *George Barker (Transport) Ltd v Eynon* [1974] 1 All ER 900, [1974] 1 WLR 462, CA; *Security Trust Co v Royal Bank of Canada* [1976] AC 503, [1976] 1 All ER 381, PC; *Re Interview Ltd* [1975] IR 382; *Re Harrex* [1976] IR 15.
- 23 Is a form satisfying the Stock Transfer Act 1963 s 1, Sch 1: see **COMPANIES** vol 14 (2009) PARA 400.
- 24 *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA. In *Pennington v Waine* [2002] EWCA Civ 227, [2002] 4 All ER 215, [2002] 1 WLR 2075, Arden LJ, with whose judgment Schiemann LJ agreed, took the view that *Re Rose, Rose v IRC* [1952] Ch 499, [1952] 1 All ER 1217, CA required delivery of the share transfer but further held that delivery could be dispensed with in some circumstances where it would be unconscionable for the transferor to recall the gift. In the same case Clarke LJ considered that signing the form in circumstances in which the transferor had no intention of revoking it in the future constituted a valid equitable assignment without the need for delivery.
- 25 See *Coulter v Chief Constable of Dorset Police* [2004] EWCA Civ 1259, [2005] 1 WLR 130, [2004] All ER (D) 102 (Oct).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/38. Examples of transactions which are not equitable assignments.

### 38. Examples of transactions which are not equitable assignments.

The following transactions do not operate as equitable assignments:

- 93 (1) a mere order by a creditor to his debtor to pay a sum of money to a third party, where no fund is specified out of which payment is to be made<sup>1</sup>;
- 94 (2) an agreement by a borrower to pay into the lender's bank the proceeds of the sale of goods bought with the borrowed money<sup>2</sup>;
- 95 (3) a bill of exchange drawn on a debtor, though for the exact amount of the debt<sup>3</sup>;
- 96 (4) a request by a person who has funds in the hands of another to that other to pay a sum to a third party, when the request is not communicated to the latter<sup>4</sup>;
- 97 (5) a direction to pay to the account of the creditor at a bank<sup>5</sup>;
- 98 (6) an authority by a creditor to the solicitors of his debtor to receive the debt and pay it to a third party<sup>6</sup>;
- 99 (7) a mere authority to collect freight given by the master of a ship to the agents of the ship at the port of discharge<sup>7</sup>;
- 100 (8) a mere intimation to the fundholder that a third party has a claim on the fund<sup>8</sup>;
- 101 (9) a third party debt order (formerly known as a 'garnishee order')<sup>9</sup>;
- 102 (10) a revocable nomination, under a pension scheme, which would not in any event take effect until the death of the nominator<sup>10</sup>.

A reference on a bill of exchange to proceeds of certain cargoes against which the bills are to be charged is not an equitable assignment of those proceeds<sup>11</sup>; nor is a representation by the drawer that bills of exchange will be paid, as the drawer has remitted funds to the drawee, an assignment of those funds<sup>12</sup>. So a promise to pay a debt when certain funds are received does not charge those funds<sup>13</sup>. An assignment of the benefit of a contract to lend a sum of money does not give the assignee any right against the intended lender, though it would bind the loan in the hands of the assignor, and, if the money were remitted by a bank bill or in some other like manner, the assignee could intervene by applying for an injunction or the appointment of a receiver and obtain payment to himself<sup>14</sup>. A letter from bankers stating that they have opened a credit for a certain sum is not an equitable assignment of that sum<sup>15</sup>. A contract does not ordinarily operate as an equitable assignment<sup>16</sup>.

1 *Re Gunsbrough, ex p Trustee* (1919) 88 LJKB 479, CA; *Ratner v London Joint City and Midland Bank* (1922) 38 TLR 253; *Percival v Dunn* (1885) 29 ChD 128 (where the order was handed to the third party). Similarly the giving of a cheque does not operate as an equitable assignment: *Hopkinson v Forster* (1874) LR 19 Eq 74; *Schroeder v Central Bank of London Ltd* (1876) 24 WR 710; cf *Re Beaumont*, *Beaumont v Ewbank* [1902] 1 Ch 889 at 895.

2 *Palmer v Carey* [1926] AC 703, PC. Cf *Re Gillott's Settlement*, *Chattock v Reid* [1934] Ch 97.

3 Bills of Exchange Act 1882 s 53(1); *Shand v Du Buisson* (1874) LR 18 Eq 283; and see *Brown, Shipley & Co v Kough* (1885) 29 ChD 848 at 875, CA. The bill itself may, however, be assigned (*Re Barrington and Burton* (1804) 2 Sch & Lef 112); and there may be a collateral agreement amounting to an assignment of the funds in the drawee's hands (*Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352 at 359, 365; *Thomson v Simpson* (1870) 5 Ch App 659).

4 *Morrell v Wootten* (1852) 16 Beav 197; *Re Hamilton, FitzGeorge v FitzGeorge* (1921) 124 LT 737, CA; and see *Scott v Porcher* (1817) 3 Mer 652; *Hill v Royds* (1869) LR 8 Eq 290; *Timpson's Executors v Yerbury* [1936] 1 KB 645, [1936] 1 All ER 186, CA (a mere revocable mandate); and PARA 43.

5 *Bell v London and North Western Rly Co* (1852) 15 Beav 548 (where such a direction was held not to be a good assignment to the bank); distinguish *Re Kent and Sussex Sawmills Ltd* [1947] Ch 177, [1946] 2 All ER 638 (mandate irrevocable except with bank's consent). See also PARAS 26, 79 text and note 9.

6 *Rodick v Gandell* (1852) 1 De GM & G 763; *Flightline Ltd v Edwards* [2003] EWCA Civ 63, [2003] 3 All ER 1200, [2003] 1 WLR 1200; and cf *Re Russell, Russell v Oakes* (1893) 37 Sol Jo 212.

7 *HG Harper & Co v J Bland & Co Ltd* (1914) 84 LJB 738. An express direction to pay the freight to the agents amounts to an assignment: *The Zigurds* (1931) 47 TLR 525; and see PARA 37 text and note 7.

8 *Watson v Duke of Wellington* (1830) 1 Russ & M 602.

9 *Re Combined Weighing and Advertising Machine Co* (1889) 43 ChD 99 at 104-105, CA. As to third party debt orders see **CIVIL PROCEDURE** vol 12 (2009) PARA 1411 et seq.

10 *Re Danish Bacon Co Ltd Staff Pension Fund, Christensen v Arnett* [1971] 1 All ER 486, [1971] 1 WLR 248.

11 *Robey & Co's Perseverance Ironworks v Ollier* (1872) 7 Ch App 695; *Phelps, Stokes & Co v Comber* (1885) 29 ChD 813, CA; *Brown, Shipley & Co v Kough* (1885) 29 ChD 848, CA (where the effect of letters of advice accompanying bills of exchange was also discussed); and see also *Frith v Forbes* (1862) 4 De GF & J 409.

12 *Thomson v Simpson* (1870) 5 Ch App 659; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352.

13 *Field v Megaw* (1869) LR 4 CP 660. See also *Malcolm v Scott* (1843) 3 Hare 39 (subsequent proceedings (1850) 3 Mac & G 29); *Mercer v Vans Colina* (1897) reported [1900] 1 QB 130n (a promise to pay half a commission when earned).

14 *Western Wagon and Property Co v West* [1892] 1 Ch 271 at 276; and see *May v Lane* (1894) 64 LJB 236, CA.

15 *Morgan v Larivière* (1875) LR 7 HL 423.

16 *Hobbs v Marlowe* [1978] AC 16 at 42, [1977] 2 All ER 241 at 257, HL, per Lord Simon of Glaisdale who, as reported in All ER, continued that it might do so exceptionally by virtue of the maxim that 'Equity looks on that as done which ought to be done', giving as an example a contract by A to convey Blackacre to B when the equitable estate in Blackacre passes to B at the time of the contract. Arguably this example involves the imposition of a constructive trust rather than an equitable assignment.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(i) What amounts to an Equitable Assignment/39. Assignment of securities.

### **39. Assignment of securities.**

The assignment of a debt may perhaps imply the assignment of the securities for it<sup>1</sup>; on the other hand, securities may be assigned with the intention of assigning a debt, but without the necessary formalities for the assignment of the debt, and in such case, though the assignee cannot recover the debt, yet neither the assignor nor his representatives can recover the securities, and the result may be that no one can recover the debt<sup>2</sup>. An equitable mortgagee by deposit of a deed cannot pass his interest in the property by a parol voluntary gift accompanied by delivery of the deed and as his interest in the deed is only incidental to his interest in the mortgage the donee of the deed has no right to retain it<sup>3</sup>; however, a mere deposit of title deeds is no longer effective to create an equitable mortgage over an interest in land<sup>4</sup>.

1 *Re Patrick, Bills v Tatham* [1891] 1 Ch 82 at 87, CA.

2 *Rummens v Hare and Rummens* (1876) 1 ExD 169, CA; and see *Searle v Law* (1846) 15 Sim 95; *Barton v Gainer* (1858) 3 H & N 387.

3 *Re Richardson, Shillito v Hobson* (1885) 30 ChD 396, CA; *Re Hancock, Hancock v Berrey* (1887) 57 LJ Ch 793.

4 See **MORTGAGE** vol 77 (2010) PARAS 105, 118.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/40. Notice to debtor not necessary as between assignor and assignee.

## (ii) Notice of the Assignment

### 40. Notice to debtor not necessary as between assignor and assignee.

As between the assignor and the assignee, an equitable assignment, whether voluntary or for value, is absolute and complete without notice having been given to the debtor or fundholder<sup>1</sup>, for notice does not render the title perfect<sup>2</sup>, and formerly was not even a step in the title<sup>3</sup>. Moreover, notice is not necessary as against third persons who stand in the same position as the assignor, such as persons claiming under a subsequent assignment as volunteers<sup>4</sup>, or a creditor who has obtained a charging order<sup>5</sup>, or an order appointing a receiver<sup>6</sup>, or a third party debt order<sup>7</sup>, even though in the last case the judgment creditor gives notice to the trustee before the assignee<sup>8</sup>, or the trustee in bankruptcy of the assignor<sup>9</sup>.

1 *Re City Life Assurance Co Ltd* [1926] Ch 191 at 215, CA, per Pollock MR, and at 220 per Warrington LJ; *Burn v Carvalho* (1839) 4 My & Cr 690 at 702; *Rodick v Gandell* (1851) 1 De GM & G 763 at 780; *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128, CA; *Donaldson v Donaldson* (1854) Kay 711; *Withington v Tate* (1869) 4 Ch App 288; *London and Yorkshire Bank Ltd v White* (1895) 11 TLR 570, DC; *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL, citing with approval *Re Row, ex p South* (1818) 3 Swan 392; *Jones v Farrell* (1857) 1 De G & J 208; *Re Trytel, ex p Trustee of the Property of The Bankrupt v Performing Right Society Ltd and Soundtrac Film Co Ltd* [1952] 2 TLR 32; *Weddell v JA Pearce & Major* [1988] Ch 26, [1987] 3 All ER 624. Communication to the assignee may be necessary to bind the assignor: see PARA 32.

2 *Ward and Pemberton v Duncombe* [1893] AC 369 at 392, HL.

3 *Foster v Cockerell* (1835) 3 Cl & Fin 456, HL.

4 *Justice v Wynne* (1860) 12 I ChR 289; *West v Williams* [1899] 1 Ch 132, CA.

5 *Beavan v Earl of Oxford* (1855) 6 De GM & G 492; *Eyre v M'Dowell and Wheatley* (1861) 9 HL Cas 619; *Kinderley v Jervis* (1856) 22 Beav 1; *Scott v Lord Hastings* (1858) 4 K & J 633; *United Bank of Kuwait plc v Sahib* [1995] 2 All ER 973 (affd [1997] Ch 107, CA).

6 *Arden v Arden* (1885) 29 ChD 702; *Re Bristow* [1906] 2 IR 215. A receivership order, however, may prevent a subsequent mortgagee from obtaining priority by stop order: *Re Marquis of Anglesey, Countess De Galve v Gardner* [1903] 2 Ch 727.

7 *Pickering v Ilfracombe Rly Co* (1868) LR 3 CP 235; *Robinson v Nesbitt* (1868) LR 3 CP 264; *Re General Horticultural Co, ex p Whitehouse* (1886) 32 ChD 512; *Badeley v Consolidated Bank* (1888) 38 ChD 238, CA; *Davis v Freethy* (1890) 24 QBD 519, CA; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404.

8 *Arden v Arden* (1885) 29 ChD 702.

9 *Re Wallis, ex p Jenks* [1902] 1 KB 719; *Re Anderson* [1911] 1 KB 896.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/41. Notice as between assignee and debtor.

#### **41. Notice as between assignee and debtor.**

In order to make the assignee's title effective against the debtor or fundholder and third parties notice of the assignment must be given to the debtor or fundholder<sup>1</sup>, though no assent or acquiescence on the part of the debtor or fundholder is necessary<sup>2</sup>. Thus an equitable assignee of a contractual option who has not given notice is not entitled to exercise the option in his own name<sup>3</sup>.

1 *Dearle v Hall, Loveridge v Cooper* (1828) 3 Russ 1 at 23; *Meux v Bell* (1841) 1 Hare 73. See also *Compaq Computer Ltd v Abercorn Group* [1993] BCLC 602. In *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA, this paragraph (as set out in a previous edition of this title) was cited and applied to an option: see at 442 and 110 per Lord Denning MR. See also Diana M Closs (1975) 39 Conv 261. Notice to trustees of a mortgage of personalty vested in them of an assignment by way of mortgage without a requirement for the trustees to pay the income to the assignee is not equivalent to entering into possession of the mortgaged property by the mortgagee: *Re Pawson's Settlement, Higgins v Pawson* [1917] 1 Ch 541. Cf also *Kelly v Selwyn* [1905] 2 Ch 117 at 121. Such notice does not require registration as a bill of sale: *London and Yorkshire Bank Ltd v White* (1895) 11 TLR 570, DC.

2 *Burn v Carvalho* (1839) 4 My & Cr 690; *Morrell v Wootten* (1852) 16 Beav 197; *Bell v London and North Western Ry Co* (1852) 15 Beav 548; *Re Row, ex p South* (1818) 3 Swan 392, approved in *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461, HL, per Lord Macnaghten. The debtor's express dissent is immaterial: *M'Gowan v Smith* (1856) 26 LJ Ch 8; *Brice v Bannister* (1878) 3 QBD 569 at 575, CA; *Tibbits v George* (1836) 5 Ad & El 107. As to the position of the debtor after notice see PARA 70.

3 *Warner Bros Records Inc v Rollgreen Ltd* [1976] QB 430, [1975] 2 All ER 105, CA; but see *Three Rivers District Council v Bank of England* [1996] QB 292, [1995] 4 All ER 312, CA.

This paragraph (as set out in a previous edition of this title) was cited as correctly stating the law in *Herkules Piling Ltd v Tilbury Construction Ltd* (1992) 32 ConLR 112.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/42. Payment to assignor before notice to debtor.

#### **42. Payment to assignor before notice to debtor.**

If no notice is given to the debtor or other fundholder the assignee will have to give credit to him for any payment made by him to the assignor while he is in ignorance of the assignment<sup>1</sup>. If, before receiving notice of the assignment of a debt, the debtor has handed a cheque to the creditor in payment, he may disregard any subsequent notice of an assignment, even though when the notice is received the cheque is still outstanding in the hands of the creditor<sup>2</sup>. A release of the debt by the assignor before notice will be good against the assignee<sup>3</sup>. The debtor or holder of the fund cannot after notice of the assignment alter his rights to the prejudice of the assignee<sup>4</sup>.

1 *Norrish v Marshall* (1821) 5 Madd 475; *Stocks v Dobson* (1853) 4 De GM & G 11; *Leslie v Baillie* (1843) 2 Y & C Ch Cas 91 at 97; *Donaldson v Donaldson* (1854) Kay 711; and see *Re Lord Southampton's Estate*, *Allen v Lord Southampton*, *Banfater's Claim* (1880) 16 ChD 178 at 186; *Re Patrick*, *Bills v Tatham* [1891] 1 Ch 82, CA.

2 *Bence v Shearman* [1898] 2 Ch 582, CA.

3 *Stocks v Dobson* (1853) 4 De GM & G 11.

4 *Bradford Banking Co Ltd v Briggs, Son & Co Ltd* (1886) 12 App Cas 29, HL; *West v Williams* [1899] 1 Ch 132, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/43. Priority determined by notice to debtor.

### 43. Priority determined by notice to debtor.

If no notice is given to the debtor or fundholder, the assignee will be postponed to a subsequent assignee who has given prior notice<sup>1</sup>, provided that the subsequent assignee does not know of the prior assignment at the time when he takes his security<sup>2</sup>. If the subsequent assignee does not know of the prior assignment when he takes his security, the fact that he has that knowledge at the time when he gives his notice is immaterial<sup>3</sup>. Constructive notice to a second assignee of a prior assignment is sufficient to prevent him from obtaining priority by giving prior notice<sup>4</sup>, but mere notice of the existence of a prior document which may, or may not, affect the property does not preclude his obtaining priority by giving notice before the first assignee<sup>5</sup>.

These principles apply equally where the first assignee is a legal assignee under the Law of Property Act 1925<sup>6</sup>; and also where the second assignee has taken his assignment from the legal personal representative of the person who assigned to the first assignee<sup>7</sup>.

Where the second assignee has alone given notice, the first assignee will be postponed even if he has contracted not to give notice, or holds a security (as, for example, a debenture of a company giving a general floating charge) which from its nature prevents notice from being effectively given<sup>8</sup>.

Where the notices of several incumbrances are simultaneous, the incumbrances will rank in order of their dates<sup>9</sup>, and, in considering whether notices are simultaneous, portions of days will be taken into account<sup>10</sup>.

Insurance policies are, in respect of notice, subject to the same rule as other choses or things in action, and notice to the office or the underwriter by a later incumbrancer without notice will, in the absence of other circumstances, give him priority over an earlier incumbrancer<sup>11</sup>.

The above principles as to the obtaining of priority by notice do not apply as between volunteers<sup>12</sup>, nor do they apply where the assignor had no beneficial interest and had not deprived himself of a beneficial interest by voluntarily divesting himself of it<sup>13</sup>.

1 *Dearle v Hall, Loveridge v Cooper* (1828) 3 Russ 1; *Ward and Pemberton v Duncombe* [1893] AC 369, HL; *Ellerman Lines Ltd v Lancaster Maritime Co Ltd, The Lancaster* [1980] 2 Lloyd's Rep 497; cf *Re Sandes' Trusts* [1920] 1 IR 342, CA. See also *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484. See **MORTGAGE** vol 77 (2010) PARA 267. As to the priority of a trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 398.

2 *Timson v Ramsbottom* (1837) 2 Keen 35; *Warburton v Hill, Stent v Wickens* (1854) Kay 470; *Re Hamilton's Windsor Ironworks, ex p Pitman and Edwards* (1879) 12 ChD 707 at 711; *Newman v Newman* (1885) 28 ChD 674; *Re Holmes* (1885) 29 ChD 786, CA; *Rhodes v Allied Dunbar Pension Services Ltd, Re Offshore Ventilation Ltd* [1988] 1 All ER 524, [1987] 1 WLR 1703 (revsd on appeal [1989] 1 All ER 1161, [1989] 1 WLR 800, CA).

3 *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460, CA.

4 *English and Scottish Mercantile Investment Trust v Brunton* [1892] 2 QB 1 (affd [1892] 2 QB 700, CA); *Spencer v Clarke* (1878) 9 ChD 137. See also PARA 48 text and note 2. The purchaser of an interest in land in good faith and for valuable consideration may be protected from constructive or imputed notice: see the Law of Property Act 1925 s 199. As to constructive notice see generally **EQUITY**.

5 *English and Scottish Mercantile Investment Trust v Brunton* [1892] 2 QB 1; affd [1892] 2 QB 700, CA.

6 *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150. See also *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484.

7 *Re Freshfield's Trust* (1879) 11 ChD 198; *Montefiore v Guedalla* [1903] 2 Ch 26, CA.

8 *English and Scottish Mercantile Investment Trust v Brunton* [1892] 2 QB 1 at 8 (affd [1892] 2 QB 700, CA); cf *Etty v Bridges* (1843) 2 Y & C Ch Cas 486 (where, there being no person to whom notice of a charge on stock could be given, the second incumbrancer obtained priority by a distringas). As to a stop notice, which has replaced a distringas, see PARA 54.

9 *Calisher v Forbes* (1871) 7 Ch App 109; *Johnstone v Cox* (1880) 16 ChD 571 (affd (1881) 19 ChD 17, CA).

10 *Johnstone v Cox* (1880) 16 ChD 571 at 575; affd (1881) 19 ChD 17, CA.

11 *Re Lake, ex p Cavendish* [1903] 1 KB 151; *Re Weniger's Policy* [1910] 2 Ch 291; *Newman v Newman* (1885) 28 ChD 674. As to the assignment of policies of life assurance, and as to notice of assignment, see also PARA 72 text and notes 6-7. See also the Policies of Assurance Act 1867 ss 1, 3, 5, Schedule; and **INSURANCE** vol 25 (2003 Reissue) PARA 548 et seq.

12 *Justice v Wynne* (1860) 12 I Ch R 289.

13 *BS Lyle Ltd v Rosher* [1958] 3 All ER 597, [1959] 1 WLR 8, HL; *Hill v Peters* [1918] 2 Ch 273. See also *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/44. Absence of negligence on part of first assignee immaterial.

**44. Absence of negligence on part of first assignee immaterial.**

It is immaterial that there has been no negligence on the part of the first assignee<sup>1</sup>. Consequently, where the interest charged is an expectant one under the will of a living person, and, after the death, the second assignee happens to be the first to hear of administration having been taken out and is the first to give notice to the administrator, he will have priority, though the first assignee gives notice as soon as he finds out who is administrator<sup>2</sup>.

<sup>1</sup> *Ward and Pemberton v Duncombe* [1893] AC 369 at 390, HL; *Re Dallas* [1904] 2 Ch 385 at 413, CA.

<sup>2</sup> *Re Dallas* [1904] 2 Ch 385, CA; and see *Re Lake, ex p Cavendish* [1903] 1 KB 151; *Johnstone v Cox* (1880) 16 ChD 571 (affd (1881) 19 ChD 17, CA).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/45. Priority of competing equitable interests in land.

#### **45. Priority of competing equitable interests in land.**

Before 1926, the principle of obtaining priority by notice did not apply to interests in land<sup>1</sup> other than such equitable interests in land as could only reach the hands of the beneficiary or assignor in the shape of money, for example the proceeds of sale of land or the rents and profits until sale<sup>2</sup>.

Since 1925, the principle has applied to equitable interests in both real and personal estate, because it is, by statute, made applicable to determine the priority of competing interests arising out of dealings<sup>3</sup> with equitable interests in land<sup>4</sup>, capital money<sup>5</sup> and securities representing capital money effected on or after 1 January 1926<sup>6</sup>. Priorities acquired before that date are not affected<sup>7</sup>. The statutory provision does not apply until a trust has been created<sup>8</sup>, but it applies whether or not the money or securities are in court<sup>9</sup>.

1 *Re Richards, Humber v Richards* (1890) 45 ChD 589; *Hopkins v Hemsworth* [1898] 2 Ch 347; *Taylor v London and County Banking Co, London and County Banking Co v Nixon* [1901] 2 Ch 231, CA (equitable sub-mortgages by deposit of mortgage deeds (but see now PARA 39 text and note 4); it was held that, although a mortgage debt was a chose or thing in action, yet where the security was land, the mortgagee had an interest in land and priorities were governed by the rules applicable to interests in land). The Law of Property Act 1925 s 137(1) (see the text to note 6) would seem to apply to sub-mortgages by an equitable mortgagee; but see s 137(10), cited in the text to note 8.

2 *Ward and Pemberton v Duncombe* [1893] AC 369 at 390, HL; *Lee v Howlett* (1856) 2 K & J 531; *Foster v Cockerell* (1835) 3 Cl & Fin 456, HL; *Consolidated Investment and Insurance Co v Riley* (1859) 1 Giff 371; *Re Hughes' Trusts* (1864) 2 Hem & M 89.

3 'Dealing' includes a disposition by operation of law: Law of Property Act 1925 s 137(10).

4 Equitable interests in land comprise all interests which are not legal estates in land: see the Law of Property Act 1925 s 1(3).

5 As to the meaning of 'capital money' see the Law of Property Act 1925 s 205(1)(xxvi); the Settled Land Act 1925 s 117(1)(ii); and **SETTLEMENTS** vol 42 (Reissue) PARA 795. Since 1 January 1997 it has been impossible to create strict settlements under the Settled Land Act 1925 except in a very limited class of cases: see **SETTLEMENTS** vol 42 (Reissue) PARA 675.

6 Law of Property Act 1925 s 137(1).

7 Law of Property Act 1925 s 137(7). Formerly the principle of obtaining priority by notice did not apply to equitable interests in land not subject to a trust for conversion: see *Wiltshire v Rabbits* (1844) 14 Sim 76; and the cases cited in note 2.

8 Law of Property Act 1925 s 137(10). See also note 1.

9 Law of Property Act 1925 s 137(1).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/46. Notice in writing.

#### **46. Notice in writing.**

Since 1 January 1926, a notice of any dealing with or disposition by operation of law of an equitable interest in trust property, whether real or personal, should be in writing. A notice, otherwise than in writing, given to or received by a trustee after the creation of the trust does not affect the priority of competing claims of purchasers in that equitable interest<sup>1</sup>. The trustees for the time being are entitled to custody of the notice and, subject to payment of costs, any person interested in the equitable interest may require production of the notice<sup>2</sup>.

1 Law of Property Act 1925 s 137(3), (10).

2 Law of Property Act 1925 s 137(8).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/47. When informal notice is sufficient.

#### 47. When informal notice is sufficient.

Except in cases where writing has been made necessary by statute<sup>1</sup>, it is not necessary that a formal notice of an assignment of a chose or thing in action should be given. Any informal notice is sufficient, provided the fact of the assignment is definitely brought to the mind of the debtor or fundholder<sup>2</sup>. The notice may, indeed, be received by the debtor otherwise than from either of the parties to the assignment, as, for instance, by reading of the fact in a newspaper<sup>3</sup>. It is sufficient to show that the debtor has had knowledge of the assignment, regardless of the source or mode of his knowledge<sup>4</sup>. A statement made casually in the course of general conversation is not, however, sufficient notice<sup>5</sup>.

Incumbrances will not rank in order of accidental knowledge obtained by the trustees<sup>6</sup>; but where a trustee, before his appointment, acquires knowledge of an incumbrance on the trust estate in such a way that, as a reasonable person, he would, on his appointment, act in the execution of the trust on the information so acquired, or that knowledge continues so to operate on his mind after his appointment, notice given to him after his appointment by a subsequent incumbrancer will not displace the priority of the earlier incumbrance<sup>7</sup>.

The question which could arise in bankruptcy before the Insolvency Act 1985<sup>8</sup> of what is sufficient notice to prevent a thing from being in the order and disposition of an apparent owner is not analogous to the question of what is sufficient notice of an equitable assignment<sup>9</sup>.

1 See PARA 46.

2 *Lloyd v Banks* (1868) 3 Ch App 488; *Smith v Smith* (1833) 2 Cr & M 231; *Browne v Savage* (1859) 4 Drew 635 at 640; *Newman v Newman* (1885) 28 ChD 674; and see *Re Eyles, ex p Stright* (1832) 2 Deac & Ch 314; *Re Croggon, ex p Carbis* (1834) 4 Deac & Ch 354 at 357; *Smith v Zigurds (Owners)* [1934] AC 209, HL; *James Talcott Ltd v John Lewis & Co Ltd* [1940] 3 All ER 592, CA (where an ambiguous notice stamped on an invoice was held to be insufficient); *G & N Angelakis Shipping Co SA v Cie National Algerienne de Navigation, The Attika Hope* [1988] 1 Lloyd's Rep 439; *Colonial Mutual General Insurance Co Ltd v ANZ Banking Group (New Zealand) Ltd* [1995] 3 All ER 987, [1995] 1 WLR 1140, PC. The knowledge may be acquired during an action to recover the sum assigned: *Mercer v Vans Colina* (1897) [1900] 1 QB 130n at 131n.

3 *Lloyd v Banks* (1868) 3 Ch App 488; *Arden v Arden* (1885) 29 ChD 702 at 708.

4 *Smith v Smith* (1833) 2 Cr & M 231; *Ward and Pemberton v Duncombe* [1893] AC 369, HL; and see *Re Worcester, ex p Agra Bank* (1868) 3 Ch App 555 at 559. As to what constitutes notice for the purpose of priorities of dealings see generally **EQUITY**.

5 *Re Tichener* (1865) 35 Beav 317; *Re Brown's Trusts* (1867) LR 5 Eq 88; *Lloyd v Banks* (1868) 3 Ch App 488 at 490; *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 ChD 406, CA; *Re Croggon, ex p Carbis* (1834) 4 Deac & Ch 354 (conversation with clerk in office of company). An oral notice in the ordinary course of business is good: *Re Worcester, ex p Agra Bank* (1868) 3 Ch App 555.

6 *Arden v Arden* (1885) 29 ChD 702.

7 *Ipswich Permanent Money Club Ltd v Arthy* [1920] 2 Ch 257. As to the duty of the trustee to give information to intending assignees see **TRUSTS** vol 48 (2007 Reissue) PARA 964.

8 The Insolvency Act 1985 is now repealed and replaced by the Insolvency Act 1986. Under this Act goods which at the commencement of the bankruptcy are in the possession of the bankrupt in his trade or business under such circumstances that he is the reputed owner (see the Bankruptcy Act 1914 s 38(c) (repealed)) no longer form part of his estate: see the Insolvency Act 1986 s 283; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 216.



9     *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 ChD 406 at 409, CA; *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460 at 470, CA; *Lloyds Bank v Pearson* [1901] 1 Ch 865 at 872.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/48. Form and time of notice.

#### **48. Form and time of notice.**

The notice of an assignment by way of charge of a chose or thing in action need not specify the amount of the charge<sup>1</sup>. If, however, two charges are given by one deed, and the notice only mentions one of them, the notice will not operate as constructive notice of the other charge so as to give the other priority over a subsequent incumbrancer<sup>2</sup>.

A mistake, however, as to the date of the assignment does not make the notice invalid<sup>3</sup>.

Notice after the death of the assignee is sufficient, so long as the fund is still in the hands of the person to whom notice is given<sup>4</sup>.

1 *Re Bright's Trusts* (1856) 21 Beav 430 at 434; and see the form of notice in *Re Russell's Policy Trusts* (1872) LR 15 Eq 26.

2 *Re Bright's Trusts* (1856) 21 Beav 430; cf *Woodburn v Grant* (1856) 22 Beav 483.

3 *Whittingstall v King* (1882) 46 LT 520. As to the different rule in the case of a legal assignment see PARA 80.

4 *Re Russell's Policy Trusts* (1872) LR 15 Eq 26 at 29. See also the cases cited in PARA 80 notes 14-15.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/49. To whom notice should be given.

#### **49. To whom notice should be given.**

To be effectual the notice must be given to a person who at the time of the notice is the legal holder and has control of the fund for the benefit of the assignor<sup>1</sup>. Notice, therefore, to an executor who afterwards renounces is ineffectual<sup>2</sup>.

In the case of assignment of future property, expectancies and possibilities, notice to a person who only becomes the holder of the fund for the benefit of the assignor when the property comes into existence after the date of the notice is ineffectual<sup>3</sup>, but, where there is an existing trust fund, knowledge of an earlier incumbrance acquired by a trustee before his appointment will prevent a subsequent incumbrancer from gaining priority over the earlier incumbrancer by giving notice<sup>4</sup>.

On the same principle, when there is an original settlement and a sub-settlement, and one of the beneficiaries under the sub-settlement charges his interest under it, his incumbrancers should give notice to the trustees of the sub-settlement, and notice to them will give priority over an assignment of which prior notice is given to the trustees of the original settlement<sup>5</sup>.

Where notice has been given to the debtor, no notice to any other person is necessary to complete the assignee's title<sup>6</sup>.

Where the sole legal holder of a fund is also the equitable assignor of an interest in the fund, the knowledge which he as assignor possesses of the assignment is not equivalent to notice for the purpose of giving an equitable incumbrancer priority<sup>7</sup>.

1 *Addison v Cox* (1872) 8 Ch App 76 at 79; *Re Dallas* [1904] 2 Ch 385 at 398, 411, CA; but see PARA 47 text and note 7. For the statutory provisions regulating notices of dealings with equitable interests in land see PARA 45; and see also PARAS 50-53.

2 *Re Dallas* [1904] 2 Ch 385, CA.

3 *Buller v Plunkett* (1860) 1 John & H 441; *Webster v Webster* (1862) 31 Beav 393; *Somerset v Cox* (1864) 33 Beav 634; *Yates v Cox* (1868) 17 WR 20; *Johnstone v Cox* (1881) 19 ChD 17, CA; *Roxburghe v Cox* (1881) 17 ChD 520, CA; cf *Addison v Cox* (1872) 8 Ch App 76.

4 *Ipswich Permanent Money Club v Arthy* [1920] 2 Ch 257. Cf *Arden v Arden* (1885) 29 ChD 702; *Re Dallas* [1904] 2 Ch 385, CA; and see PARA 47.

5 *Holt v Dewell* (1845) 4 Hare 446; *Stephens v Green, Green v Knight* [1895] 2 Ch 148, CA, overruling *Re Booth's Settlement* (1853) 21 LTOS 239. Cf *Bridge v Beadon* (1867) LR 3 Eq 664. Since 1 January 1997 it has been impossible to create strict settlements under the Settled Land Act 1925 except in a very limited class of cases: see **SETTLEMENTS** vol 42 (Reissue) PARA 675.

6 *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321 at 336, HL. For example, notice need not be given to the persons jointly interested with the assignor: *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321 at 336, HL.

7 *Re Dallas* [1904] 2 Ch 385 at 401-402, CA; *Thompson v Speirs* (1845) 13 Sim 469; *Martin v Sedgwick* (1846) 9 Beav 333; and see *Public Works Comrs v Harby* (1857) 23 Beav 508.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/50. Notice of dealings with equitable interests in land and the proceeds of sale of land.

## **50. Notice of dealings with equitable interests in land and the proceeds of sale of land.**

There are statutory provisions as to the persons to be served with notice when a trust has been created comprising equitable interests in land, settled land, capital money or securities representing capital money<sup>1</sup>. These provisions do not apply where the money or securities affected are in court<sup>2</sup>. The persons on whom notice of a dealing<sup>3</sup> with the equitable interest is served are to be affected by it in the same manner as if they had been trustees of personal property out of which the equitable interest was created or arose<sup>4</sup>.

In the case of a dealing with an equitable interest in settled land, capital money or securities representing capital money, the persons to be served with notice of the dealing are the trustees of the settlement<sup>5</sup>.

In the case of a dealing with an equitable interest in land subject to a trust of land, or the proceeds of sale of such land, the persons to be served with notice are the trustees<sup>6</sup>.

In either case where the equitable interest is created by a derivative or subsidiary settlement, the persons to be served with notice are the trustees of that settlement<sup>7</sup>.

In any other case the person to be served with notice of a dealing with an equitable interest in land is the estate owner<sup>8</sup> of the land<sup>9</sup>.

1 Law of Property Act 1925 s 137(2), (10). As to the procedure when notice cannot be served see PARA 53.

2 Law of Property Act 1925 s 137(2). As to funds in court see PARA 55.

3 As to the meaning of 'dealing' for these purposes see PARA 45 note 3.

4 Law of Property Act 1925 s 137(2).

5 Law of Property Act 1925 s 137(2)(i). As to the meaning of 'capital money' see PARA 45 note 5.

6 Law of Property Act 1925 s 137(2)(ii) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4(15)(a)).

7 As to interests in settled land see the Law of Property Act 1925 s 137(2)(i); and PARA 49 text and note 5. Since 1 January 1997 it has been impossible to create strict settlements under the Settled Land Act 1925 except in a very limited class of cases: see **SETTLEMENTS** vol 42 (Reissue) PARA 675.

8 I.e. the owner of the legal estate in the land: Law of Property Act 1925 ss 1(4), 205(1)(v).

9 Law of Property Act 1925 s 137(2)(iii).

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/51. Nomination of trust corporation to receive notices.

### **51. Nomination of trust corporation to receive notices.**

A trust corporation<sup>1</sup> may be nominated to whom notices of dealings<sup>2</sup> affecting real and personal property may be given; the nomination may be made by the settlement or other instrument creating the trust, and in default of such nomination the trustees, if any, of the instrument, or the court on the application of any person interested, may make the nomination<sup>3</sup>. Until a notice has been received by the trust corporation, it does not affect any priority<sup>4</sup>.

1 As to the meaning of 'trust corporation' for this purpose see the Law of Property Act 1925 s 205(1)(xxviii); the Law of Property (Amendment) Act 1926 s 3; the Clergy Pensions Measure 1961 s 31; the Public Trustee Rules 1912, SR & O 1912/348, r 30; and **TRUSTS** vol 48 (2007 Reissue) PARA 798.

2 The Law of Property Act 1925 s 138(1) applies to notices of dealing affecting real or personal property, whether or not given under s 137 (see PARAS 45-46, 50): s 138(1).

3 Law of Property Act 1925 s 138(1). See further s 138(2)-(11) (containing detailed provisions regulating the appointment and procedure etc of a trust corporation); and **TRUSTS** vol 48 (2007 Reissue) PARA 803.

4 Law of Property Act 1925 s 138(4).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/52. Notice where there are several trustees of the fund.

## 52. Notice where there are several trustees of the fund.

Where the fund is in the hands of several trustees the best course is to give notice to each of them<sup>1</sup>. The effect of giving notice to each and every trustee is that the assignee will have priority over a subsequent assignee taking his assignment after the death or retirement of all the trustees to whom the prior notice was given, even though the subsequent assignee has given notice to the new trustees and the latter have no notice of the first assignment<sup>2</sup>. The new trustees, however, will not be personally liable if, without actual notice of the first assignment, they pay over the assigned fund to the second assignee<sup>3</sup>.

Where the fund assigned is in the hands of several trustees notice to, or knowledge by, any one of those trustees, even if he is not the acting trustee, is sufficient to protect the assignment against a subsequent assignment with notice to all or any of the trustees<sup>4</sup> so long as the trustee affected with notice of the prior assignment remains a trustee<sup>5</sup>. The priority so acquired is retained even though the one trustee who has notice dies or ceases to act as trustee after the notice of the second assignment has been given without his co-trustees having been informed of the first assignment<sup>6</sup>. If, however, at the time when the second assignment is made and notice of it is given, the trustee who alone had notice of the first assignment has ceased to be trustee, the second assignee will get priority<sup>7</sup>. Where the one trustee who has notice of the assignment has such notice by reason only of his being the assignor, the notice will not be sufficient to give priority over a subsequent incumbrancer who gives notice to the other trustees<sup>8</sup>. If the one trustee acquires notice by reason of his being assignee, that notice will be sufficient to give such priority<sup>9</sup>. Notice to one of several trustees will not operate to make the other trustees personally liable for what they may do in ignorance of the notice<sup>10</sup>.

1 *Re Hall* (1880) 7 LR Ir 180; cf PARA 80 note 1. It may be advisable, if it can be arranged, to have notice indorsed on the trust deed, if any: see *Phipps v Lovegrove*, *Prosser v Phipps* (1873) LR 16 Eq 80 at 90; cf *Denney, Gasquet and Metcalfe v Conklin* [1913] 3 KB 177. For the statutory provision as to indorsement see PARA 53.

2 *Re Wasdale, Brittin v Partridge* [1899] 1 Ch 163; and see *Ward and Pemberton v Duncombe* [1893] AC 369 at 394, HL.

3 *Hallows v Lloyd* (1888) 39 ChD 686. As to the duty of new trustees to make inquiries see *Hallows v Lloyd* (1888) 39 ChD 686 at 691; *Phipps v Lovegrove*, *Prosser v Phipps* (1873) LR 16 Eq 80 at 90.

4 *Smith v Smith* (1833) 2 Cr & M 231; *Meux v Bell* (1841) 1 Hare 73.

5 See note 7.

6 *Ward and Pemberton v Duncombe* [1893] AC 369, HL; and see *Freeman v Laing* [1899] 2 Ch 355.

7 *Timson v Ramsbottom* (1837) 2 Keen 35 at 50; *Re Phillips' Trusts* [1903] 1 Ch 183; *Re Hall* (1880) 7 LR Ir 180; *Ward and Pemberton v Duncombe* [1893] AC 369 at 382, HL, per Lord Herschell LC. See, however, *Ward and Pemberton v Duncombe* [1893] AC 369 at 394, HL, per Lord Macnaghten.

8 *Browne v Savage* (1859) 4 Drew 635; *Lloyds Bank v Pearson* [1901] 1 Ch 865; *Re Dallas* [1904] 2 Ch 385 at 401-402, CA.

9 *Browne v Savage* (1859) 4 Drew 635; *Willes v Greenhill* (1860) 29 Beav 376 (affd (1861) 4 De GF & J 147).

10 *Low v Bouverie* [1891] 3 Ch 82, CA.



Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/53. Indorsement on trust instrument in lieu of notice.

### **53. Indorsement on trust instrument in lieu of notice.**

When there is a dealing<sup>1</sup> with an equitable interest in real or personal property created by or arising under a trust<sup>2</sup>, and the trustees are not persons to whom a valid notice of the dealing can be given or there are no trustees to whom notice can be given, or for any other reason a valid notice cannot be served or cannot be served without unreasonable cost or delay, a purchaser may at his own cost require that a memorandum of the dealing be indorsed, written on or permanently annexed to the instrument creating the trust, and that the instrument be produced to him by the person having the possession or custody of it to prove that a sufficient memorandum has been placed on it or annexed to it<sup>3</sup>. Such a memorandum operates, as respects priorities, as if notice in writing of the dealing had been given to trustees duly qualified to receive the notice at the time when the memorandum is placed on or annexed to the instrument creating the trust<sup>4</sup>.

Where the property affected is settled land, the memorandum is to be placed on or annexed to the trust instrument and not the vesting instrument<sup>5</sup>. Where the property affected is land subject to a trust of land, the memorandum is to be placed on or annexed to the instrument by which the equitable interest is created<sup>6</sup>.

Where the trust is created by statute or by operation of law, or in any case where there is no trust instrument by which the trusts are declared, the instrument under which the equitable interest is acquired or which is evidence of its devolution is, for this purpose, to be deemed the instrument creating the trust<sup>7</sup>. Where the trust arises by reason of an intestacy, the letters of administration or probate in force when the dealing was affected are deemed to be the trust instrument<sup>8</sup>.

1 As to the meaning of 'dealing' for these purposes see PARA 45 note 3.

2 These provisions do not apply until a trust has been created: Law of Property Act 1925 s 137(10).

3 Law of Property Act 1925 s 137(4).

4 Law of Property Act 1925 s 137(4). In cases to which it applies, s 137(4) gets over the difficulty arising from the fact that at the date of the assignment, or when the fund charged comes into existence, there may be no person to whom effective notice may be given. It was held that that fact did not affect the priorities obtained by notices given after there was such a person: see *Johnstone v Cox* (1881) 19 ChD 17, CA; *Re Dallas* [1904] 2 Ch 385, CA; cf *Ipswich Permanent Money Club Ltd v Arthy* [1920] 2 Ch 257. See also PARAS 47, 49.

5 Law of Property Act 1925 s 137(5). Since 1 January 1997 it has been impossible to create strict settlements under the Settled Land Act 1925 except in a very limited class of cases: see **SETTLEMENTS** vol 42 (Reissue) PARA 675.

6 Law of Property Act 1925 s 137(5) (amended by the Trusts of Land and Appointment of Trustees Act 1996 Sch 3 para 4(15)(b)).

7 Law of Property Act 1925 s 137(6).

8 Law of Property Act 1925 s 137(6).



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/54. Stop notices as respects stocks and shares.

#### **54. Stop notices as respects stocks and shares.**

In the case of government stock or stock of any registered company, other than any such stock that is in court<sup>1</sup>, protection may be obtained, in the absence of any person to whom notice can be given, by service on the Bank of England or the company concerned, as the case may be, of an affidavit and stop notice in the manner prescribed by the rules of court<sup>2</sup>.

<sup>1</sup> As to funds in court see PARA 55.

<sup>2</sup> See CPR 73.16-73.21; *Practice Direction--Charging Orders, Stop Orders and Stop Notices* PD73 para 5, Appendix B; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1492-1496.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/55. Funds in court.

## 55. Funds in court.

In the case of interests in funds in court the notice must take the form of a stop order<sup>1</sup>; and a notice to the trustees will not give priority over an assignee who subsequently obtains a stop order<sup>2</sup>. This rule applies to a trustee in bankruptcy<sup>3</sup>. The stop order, however, must be one which operates as notice to the persons who are entitled to the fund as trustees for the assignor, not merely as notice to the trustees of a prior settlement<sup>4</sup>. Where part of a fund is in court and part in the hands of trustees, the assignee, in order to have priority, must obtain a stop order as regards the funds in court and give notice to the trustees as regards the funds in their hands<sup>5</sup>. Where an assignee has obtained a stop order on a fund in court, and the share of the assignor is subsequently carried over to a separate account of him and his incumbrancers, a second assignee does not obtain priority by a stop order on the separate account<sup>6</sup>.

A stop order on a fund paid into court by trustees will not, however, give priority over an assignment of which notice was given to the trustees before the payment in<sup>7</sup>, or over a prior assignment of which the assignee who obtains the stop order has notice at the date when he takes his security<sup>8</sup>, though notice of the prior assignment after that date but before the obtaining of the stop order is immaterial<sup>9</sup>.

1 *Re Holmes* (1885) 29 ChD 786, CA; *Elder v Maclean* (1857) 29 LTOS 72 (where the first assignee was himself a trustee of the fund); *Greening v Beckford* (1832) 5 Sim 195. If a life interest only is charged, the order should mention that the income is restrained: *Mack v Postle* [1894] 2 Ch 449. As to stop orders on funds in court see CPR 73.11-73.15, particularly CPR 73.13; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1488-1491.

2 *Pinnock v Bailey* (1883) 23 ChD 497; and see *Bartlett v Bartlett* (1857) 1 De G & J 127 at 141.

3 *Stuart v Cockerell* (1869) LR 8 Eq 607; *Palmer v Locke* (1881) 18 ChD 381, CA. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 398.

4 *Stephens v Green, Green v Knight* [1895] 2 Ch 148, CA (where the fund was in court in an action to administer the will of A, and B, a beneficiary under the will, had bequeathed his interest to the assignor, a notice to the executor of B was held to give priority over a stop order previously obtained, which had the effect only of a notice to the executors of A); and see PARA 49.

5 *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460, CA.

6 *Lister v Tidd* (1867) LR 4 Eq 462. As to the effect of carrying over a fund to a separate account see *Cloutte v Storey* [1911] 1 Ch 18 at 34-36, CA.

7 *Livesey v Harding* (1856) 23 Beav 141; *Thompson v Tomkins* (1862) 2 Drew & Sm 8 at 20; *Re Marquis of Anglesey, Countess De Galve v Gardner* [1903] 2 Ch 727 at 732.

8 *Re Holmes* (1885) 29 ChD 786, CA.

9 *Mutual Life Assurance Society v Langley* (1886) 32 ChD 460, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/56. Notice to company.

## 56. Notice to company.

In order that notice to a company of an assignment may be effectual, it must be given to the proper officers when engaged in the business of the company<sup>1</sup>. Casual knowledge acquired by the secretary while not transacting the business of the company is not sufficient<sup>2</sup>, nor is casual conversation with a clerk in the office<sup>3</sup>, but oral notice to the directors at a board meeting is sufficient<sup>4</sup>.

The principle that notice determines priority in the case of equitable assignments does not apply to the case of shares in companies incorporated under the Companies Act 1985 or the Companies Act 2006, or earlier Companies Acts so far as the company itself is concerned<sup>5</sup>. The directors, however, may perhaps be personally liable if they give effect to a transfer of shares when they have notice of a previous equitable assignment<sup>6</sup>.

1 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424, CA (affd but not on this point sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL) (secretary); *Gale v Lewis* (1846) 9 QB 730 (agent of insurance company); *Re Raikes, ex p Waithman* (1835) 4 Deac & Ch 412 (where a director of an insurance company deposited his life policy issued by the company with a banker, who was also auditor of the company, and the company was held affected with notice); *Re Kidder, ex p Burbridge* (1835) 1 Deac 131 (where it was held that the private knowledge one of the directors and the actuary had of the transaction could not operate as notice to the company). As to notice to a company see further **COMPANIES**.

2 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424, CA; affd but not on this point sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL. As to what will not constitute notice of a trust to a bank see also *Simpson v Molson's Bank* [1895] AC 270, PC.

3 *Re Croggon, ex p Carbis* (1834) 4 Deac & Ch 354.

4 *Re Worcester, ex p Agra Bank* (1868) 3 Ch App 555.

5 *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30, HL. See also the Companies Act 1985 s 360 (repealed as from 1 October 2009 and replaced by the Companies Act 2006 s 126); and **COMPANIES** vol 14 (2009) PARA 343.

6 *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424, CA; see, however, that case on appeal sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20 at 30, HL.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/57. Notice to solicitor.

### **57. Notice to solicitor.**

The fact that the solicitor who negotiates the mortgage of a policy is the local agent of the insurance office is not sufficient to affect that office with notice of the charge<sup>1</sup>, unless he has express authority from the office to receive notice on its behalf <sup>2</sup>.

Notice to the solicitors of the trustees of an assignment of a fund is not sufficient, unless they have authority, express or implied, to receive such notice<sup>3</sup>.

1 *Re Russell's Policy Trusts* (1872) LR 15 Eq 26 at 30.

2 *Gale v Lewis* (1846) 9 QB 730. As to the assignment of policies of life assurance see PARA 72 text and notes 6-7. See also the Policies of Assurance Act 1867; and **INSURANCE** vol 25 (2003 Reissue) PARA 548 et seq.

3 *Willes v Greenhill* (1860) 29 Beav 376 at 392 (affd (1861) 4 De GF & J 147); *Saffron Walden Second Benefit Building Society v Rayner* (1880) 14 ChD 406, CA; *Arden v Arden* (1885) 29 ChD 702 at 709; *Rickards v Gledstanes* (1862) 31 LJ Ch 142; *Whittingstall v King* (1882) 46 LT 520 at 521; and see *Re Cousins* (1886) 31 ChD 671; *Re Durand's Trust* (1859) 1 LT 84; *Re Lord Southampton's Estate, Allen v Lord Southampton, Banfather's Claim* (1880) 16 ChD 178.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/58. Duty of estate owner.

### **58. Duty of estate owner.**

In the case of a trust comprising equitable interests in land, the liability of the estate owner of the legal estate in the land to produce documents and furnish information to persons entitled to equitable interests in it corresponds to the liability of a trustee of land<sup>1</sup> to produce documents and furnish information to persons entitled to equitable interests in the proceeds of sale of the land<sup>2</sup>.

1 The Law of Property Act s 137 refers to a trustee for sale; such references to a trustee for sale should now generally be read as references to a trustee of land, following the enactment of the Trusts of Land and Appointment of Trustees Act 1996: see **REAL PROPERTY; TRUSTS** vol 48 (2007 Reissue) PARA 605. The consequential amendments made by that Act did not include amendment of the Law of Property Act 1925 s 137, but it seems that this omission is inadvertent.

2 Law of Property Act 1925 s 137(9), (10). As to the duties of trustees generally in this respect see **TRUSTS** vol 48 (2007 Reissue) PARA 962 et seq.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(ii) Notice of the Assignment/59. Failure to give notice.

### **59. Failure to give notice.**

On the purchase of a reversionary interest from a mortgagee, it is not a fatal defect in the title that notice of the mortgage has not been given to the trustees, if it can be shown that no subsequent incumbrancer has given notice<sup>1</sup>.

A solicitor's lien on a policy, which only gives the right to hold the document but no right to the fund, is not lost by not giving notice to the insurance company, as against a subsequent assignee who has given notice<sup>2</sup>.

1 *Hobson v Bell* (1839) 2 Beav 17.

2 *West of England Bank v Batchelor* (1882) 51 LJ Ch 199; and see **LEGAL PROFESSIONS** vol 66 (2009) PARA 997 et seq.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/60. Assignee subject to equities.

### **(iii) Assignee takes subject to all Equities**

#### **60. Assignee subject to equities.**

In the case of an equitable assignment of a chose or thing in action, the debtor or fundholder has as against the assignee the same equities<sup>1</sup> and the same rights of set-off and other defences<sup>2</sup> as he would have had against the assignor at the date at which notice of the assignment is given to him<sup>3</sup>. The assignee cannot be better off than the assignor and so takes the chose assigned to him together with any restrictions attaching to it, including an exclusive jurisdiction clause<sup>4</sup>.

It is erroneous to treat an inability of the assignor to recover because of the width of the promise sued on as being the same as an equity to which the assignment is subject<sup>5</sup>.

1 *Phipps v Lovegrove, Prosser v Phipps* (1873) LR 16 Eq 80 at 88; *Coles v Jones* (1715) 2 Vern 692; *Douglas v Russell* (1831) 4 Sim 524 at 533 (affd (1833) 1 My & K 488); *Tooth v Hallett* (1869) 4 Ch App 242.

2 *Roxburghe v Cox* (1881) 17 ChD 520 at 526, CA, per James LJ; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741, [1977] 1 WLR 578; *Colonial Bank v European Grain and Shipping Ltd* [1987] 1 Lloyd's Rep 239 (revsd [1988] 3 All ER 233, [1988] 1 Lloyd's Rep 215, CA; revsd sub nom *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, HL); *Glencore Grain Ltd v Agros Trading Co* [1999] 2 All ER (Comm) 288, [1999] 2 Lloyd's Rep 410, CA; *Muscat v Smith* [2003] EWCA Civ 962, [2003] 1 WLR 2853, [2003] 3 EGLR 11; and see *Buck v Robson* (1878) 3 QBD 686 at 690; and PARA 63. As to rights of set-off see **CIVIL PROCEDURE** vol 11 (2009) PARA 634 et seq.

3 *Mangles v Dixon* (1852) 3 HL Cas 702; *Cavendish v Greaves* (1857) 24 Beav 163; *Phipps v Lovegrove, Prosser v Phipps* (1873) LR 16 Eq 80 at 88; *Bergmann v Macmillan* (1881) 17 ChD 423; *Horsfall v Halifax and Huddersfield Union Banking Co* (1883) 52 LJ Ch 599; *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175; *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674; *Graham v Johnson* (1869) LR 8 Eq 36; cf *Watts v Driscoll* [1901] 1 Ch 294, CA; *Pan Ocean Shipping Co Ltd v Creditcorp Ltd, The Trident Beauty* [1993] 1 Lloyd's Rep 443, CA (affd [1994] 1 All ER 470, [1994] 1 WLR 161, HL).

4 *Glencore International AG v Metro Trading International Inc* [1999] 2 All ER (Comm) 899, [1999] 2 Lloyd's Rep 632.

5 See *Technocrats International Inc v Frederic Ltd (No 2)* [2004] EWHC 1206 (QB), [2004] All ER (D) 354 (May).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/61. Duty of debtor on receiving notice.

**61. Duty of debtor on receiving notice.**

It is the duty of the assignee to make inquiries, and the debtor or fundholder is not bound on receiving notice to volunteer information, unless the notice shows that the assignee has been deceived<sup>1</sup>. In the latter case, if the debtor does not undeceive the assignee, he may be prevented from taking advantage of equities between himself and the assignor<sup>2</sup>.

1 *Mangles v Dixon* (1852) 3 HL Cas 702 at 734.

2 See further PARA 67 note 3.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/62. Assignee of bond, mortgage debt or debenture.

## **62. Assignee of bond, mortgage debt or debenture.**

The assignee of a bond takes it subject to all equities, and so if it is satisfied<sup>1</sup> or void or voidable<sup>2</sup> the assignee has no better right than the assignor, unless, in the case of a voidable bond at all events, the intention that the bond should be negotiable is expressed on the face of it, or, by usage, it is in fact negotiable<sup>3</sup>.

Similarly the assignee of a mortgage debt, if the assignment is made without the privity of the mortgagor, takes subject to the state of account between the mortgagor and the assignor (that is, the mortgagee) immediately before the assignment<sup>4</sup>.

Whether a debenture issued by a company is assignable free from equities depends primarily on the terms of the debenture<sup>5</sup>.

1 *Turton v Benson* (1719) 1 P Wms 496, approved in *Mangles v Dixon* (1852) 3 HL Cas 702; *Ord v White* (1840) 3 Beav 357. As to the assignment of bonds see further **DEEDS AND OTHER INSTRUMENTS** vol 13 (2007 Reissue) PARAS 124-125.

2 *Graham v Johnson* (1869) LR 8 Eq 36; cf *Hawker v Hallewell* (1856) 25 LJ Ch 558 (where a bond given for a gambling debt was held good in the hands of an assignee).

3 *Graham v Johnson* (1869) LR 8 Eq 36 at 44; *Gorgier v Mievill* (1824) 3 B & C 45; *Goodwin v Robarts* (1875) LR 10 Exch 337 (affd (1876) 1 App Cas 476, HL); *Venables v Baring Bros & Co* [1892] 3 Ch 527; *Bechuanaland Exploration Co v London Trading Bank Ltd* [1898] 2 QB 658; *Edelstein v Schuler & Co* [1902] 2 KB 144.

4 *Chambers v Goldwin* (1804) 9 Ves 254 at 264; and see **MORTGAGE** vol 77 (2010) PARA 382. The assignment of building society mortgages raises special difficulties: see *Sun Permanent Benefit Building Society v Western Suburban and Harrow Road Permanent Building Society* [1921] 2 Ch 438, CA.

5 See eg *Re Goy & Co Ltd, Farmer v Goy & Co Ltd* [1900] 2 Ch 149; *Hilger Analytical Ltd v Rank Precision Industries Ltd* [1984] BCLC 301. See also **COMPANIES** vol 15 (2009) PARAS 1299.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/63. Set-off and cross-claims.

### 63. Set-off and cross-claims.

Where the right of the assignor is subject to a set-off on the part of the debtor, the debtor may, provided the right has accrued before notice of assignment<sup>1</sup>, equally avail himself of this right against the assignee<sup>2</sup> even when the right has, before notice, been crystallised in a judgment against the assignor in favour of the debtor<sup>3</sup>. This right of set-off may, however, be negated by the express or implied terms of the contract<sup>4</sup>. Again there may be a right of set-off in the case of a debt which accrues due before the date of the notice but is not payable till after that date<sup>5</sup>. The debtor may not set off an independent debt which has accrued since notice of assignment, though due upon a contract made before such notice<sup>6</sup>, but he may set off a debt which has accrued since notice of assignment if it has arisen out of a transaction inseparably or closely connected with the original debt, or if it was the intention of the parties that one should be set off against the other<sup>7</sup>. He may also meet the claim by a counterclaim for unliquidated damages, provided that this arises out of the same contract<sup>8</sup> and is not something outside the contract, as, for example, a claim for damages for fraud against the assignor in connection with the transaction, which is a personal claim<sup>9</sup>. The debtor is not, of course, entitled to recover such damages, but only to set them off against the claim<sup>10</sup>. It is doubtful whether, in the case of an equitable assignment, a debt owed to a third person by the claimant and assigned by that third person to the defendant can be set off against the claimant<sup>11</sup>.

A debt due at the date of assignment includes a debt due from a shareholder to a company being wound up in respect of a call, though the call is not made till after the assignment, so that where a shareholder assigns a debt due to himself from the company being wound up, and notice of assignment is given to the liquidator, the assignee's title is subject to a call subsequently made by the company upon the assignor<sup>12</sup>. If, however, the assignment and notice are before the winding up, calls in the winding up cannot be set off<sup>13</sup>.

A right of set-off which is only available against the assignor on bankruptcy or winding up by virtue of the 'mutual credit' clause<sup>14</sup> is not available against the assignee<sup>15</sup>.

1 *Colvin v Hartwell* (1837) 5 Cl & Fin 484, HL; *Hunt v Jessel* (1854) 18 Beav 100; *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72; *Wilson v Gabriel* (1863) 4 B & S 243; *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674; *Watson v Mid Wales Rly Co* (1867) LR 2 CP 593; *Roxburghe v Cox* (1881) 17 ChD 520 at 526, CA; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741, [1977] 1 WLR 578 (no set-off where debt neither had accrued due before assignment nor was connected with assigned debt, even though it arose under a contract made before assignment); *Glencore Grain Ltd v Agros Trading Co* [1999] 2 All ER (Comm) 288, [1999] 2 Lloyd's Rep 410, CA. This does not apply to notice of debentures giving a floating charge: *Biggerstaff v Rowatt's Wharf Ltd*, *Howard v Rowatt's Wharf Ltd* [1896] 2 Ch 93, CA. See also *Re Poulter, Poulter v Poulter, Edwards v Poulter* (1912) 56 Sol Jo 291. The rights of a holder of an overdue bill of exchange have been held not to be affected by a collateral right of set-off between earlier parties to it: *Whitehead v Walker* (1842) 10 M & W 696; and see **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1497.

2 *Cavendish v Geaves* (1857) 24 Beav 163; *Wilson v Gabriel* (1863) 4 B & S 243; *Clark v Cort* (1840) Cr & Ph 154; *Re South Blackpool Hotel Co, ex p James* (1869) LR 8 Eq 225 (where a company's right of set-off against the assignor of debentures was held available against the assignee, following *Re Natal Investment Co, Financial Corp'n Claim* (1868) 3 Ch App 355); *Young v Kitchin* (1878) 3 ExD 127; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC; *Rother Iron Works Ltd v Canterbury Precision Engineers Ltd* [1974] QB 1, [1973] 1 All ER 394, CA (where the debt was set off against a debenture holder as equitable assignee on the crystallisation of a floating charge on the appointment of a receiver); *Muscat v Smith* [2003] EWCA Civ 962, [2003] 1 WLR 2853, [2004] HLR 65 (tenant entitled to set off against landlord's claim for assigned rent arrears any damages due to him for the assignor's breach of repairing obligations). See also *Re McKerrell, McKerrell v Gowans* [1912] 2 Ch 648 (where a person who was the part owner with the assignor of an insurance policy was allowed to set off the amount of the premiums paid on behalf of the assignor against a

claim by the trustee to whom the assignor had assigned his property for the benefit of his creditors); *Parsons v Sovereign Bank of Canada* [1913] AC 160, PC; *Banco Central SA v Lingoss & Falce Ltd and BFI Line, The Raven* [1980] 2 Lloyd's Rep 266; *First National Bank of Chicago v West of England Shipowners Mutual Protection and Indemnity Association (Luxembourg)* [1981] 1 Lloyd's Rep 54; *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, HL. For a case where an act initially wrongful was affirmed and adopted by the assignee see *Smith v Hodson* (1791) 4 Term Rep 211.

3 *Lawrence v Hayes* [1927] 2 KB 111, DC.

4 *Phoenix Assurance Co Ltd v Earl's Court Ltd* (1913) 30 TLR 50, CA. See also *Reeves v Pope* [1914] 2 KB 284, CA.

5 *Jeffryes v Agra and Masterman's Bank* (1866) LR 2 Eq 674; *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175 at 183; *Re Pinto Leite and Nephews, ex p Des Oliveira* [1929] 1 Ch 221; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741, [1977] 1 WLR 578.

6 *Watson v Mid Wales Rly Co* (1867) LR 2 CP 593; *Re China Steamship Co, ex p Mackenzie* (1869) LR 7 Eq 240 at 243; *Re Milan Tramways Co, ex p Theys* (1884) 25 ChD 587, CA; *Stephens v Venables* (1862) 30 Beav 625; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741, [1977] 1 WLR 578.

7 *Watson v Mid Wales Rly Co* (1867) LR 2 CP 593 at 597-598; *Smith v Parkes* (1852) 16 Beav 115 at 119; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC; *Webb v Smith* (1885) 30 ChD 192, CA; *Young v Kitchin* (1878) 3 ExD 127; *Business Computers Ltd v Anglo-African Leasing Ltd* [1977] 2 All ER 741, [1977] 1 WLR 578.

8 *Young v Kitchin* (1878) 3 Ex D 127; *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC; *Baker v Adam* (1910) 15 Com Cas 227 at 235; *Freightex Ltd v International Express Co Ltd* (15 April 1980, unreported), CA.

9 *Stoddart v Union Trust Ltd* [1912] 1 KB 181, CA; *Birchal v Birch, Crisp & Co* [1913] 2 Ch 375 at 379, CA.

10 See the cases cited in note 8; and see also *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, 76 LGR 735.

11 See *Bennett v White* [1910] 2 KB 1 (revsd [1910] 2 KB 643, CA), where set-off was allowed in the case of a statutory assignment by the Court of Appeal reversing the decision of the Divisional Court which was said to have overlooked the effect of the Supreme Court of Judicature Act 1873 s 25(6) (now repealed; replaced by the Law of Property Act 1925 s 136(1): see PARA 72). Cf *Mathieson's Trustee v Burrup, Mathieson & Co* [1927] 1 Ch 562; and see also *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA; and PARA 82.

12 *Re China Steamship Co, ex p Mackenzie* (1869) LR 7 Eq 240; *Re Gwelo (Matabeleland) Exploration and Development Co Ltd, Williamson's Claim* [1901] 1 IR 38, CA. As to assignment of rights by a partner see *Watts v Driscoll* [1901] 1 Ch 294, CA; *Re Garwood's Trusts, Garwood v Paynter* [1903] 1 Ch 236; and **PARTNERSHIP** vol 79 (2008) PARA 126.

13 *Christie v Taunton, Delmard, Lane & Co, Re Taunton, Delmard, Lane & Co* [1893] 2 Ch 175.

14 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 547 et seq.

15 *Re Asphaltic Wood Pavement Co, Lee and Chapman's Case* (1885) 30 ChD 216 at 221-223, CA.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/64. Equities against intermediate assignor.

**64. Equities against intermediate assignor.**

Though the assignee takes subject to equities available against the assignor, he is only thereby made liable to equities against the original assignor, not to those available against an intermediate assignor, so that where a liability, such as a set-off, only attaches to the intermediate assignor the ultimate assignee can maintain his claim freed from the equity<sup>1</sup>.

<sup>1</sup> *Re Milan Tramways Co, ex p Theys* (1884) 25 ChD 587 at 593, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/65. Equities in case of trust funds.

## 65. Equities in case of trust funds.

The assignee of a beneficiary, not being also a trustee, will take subject to his assignor's liability to the trust estate up to the time that the trustee receives notice of the assignment<sup>1</sup>, and likewise the assignee of a legacy will only take it subject to any debt due by the legatee to the estate or to any costs incurred by the executor<sup>2</sup>. The claim of an assignee of a beneficiary, however, where the assignor is not a trustee of the fund and the assignment has been duly notified to the trustee, has priority over a claim by the trustee against the assigned interest for a debt incurred by the assignor to the trustee since the assignment<sup>3</sup>.

When the assignor of a share in a trust fund is also trustee, his assignee will take subject to the obligation of making good any breaches of trust by the assignor, whether they were committed before or after the assignment<sup>4</sup>, and the effect will be the same where the interest assigned was purchased by the assignor, and not taken directly under the trust instrument<sup>5</sup>. The assignee will not be so liable, however, if the assignor became a trustee of the fund after the date of the assignment<sup>6</sup>.

Where the fund is in court to the separate account of the assignor, the assignee is not subject to his assignor's liability to make good a breach of trust<sup>7</sup>, because a separation of funds, in the absence of proof of claims which were not known or were non-existent when the fund was separated, is usually looked on as showing that the separate funds are free from claims by the other sharers in the estate<sup>8</sup>. However, the assignee of a share of a fund in court in administration proceedings, when all debts have been certified to have been paid, will take subject to the claims of creditors subsequently coming in<sup>9</sup>.

Trustees who deal with trust funds by the direction of their beneficiaries may set up the equities so created against an assignee of whom they had no notice<sup>10</sup>.

1 *Priddy v Rose* (1817) 3 Mer 86; *Clack v Holland* (1854) 19 Beav 262; *Stephens v Venables* (1862) 30 Beav 625; *Bolton v Curre* [1895] 1 Ch 544; *Re Weston, Davies v Tagart* [1900] 2 Ch 164; *Re Jewell's Settlement, Watts v Public Trustee* [1919] 2 Ch 161.

2 *Re Knapman, Knapman v Wreford* (1881) 18 ChD 300, CA; *Willes v Greenhill* (1860) 29 Beav 376 (affd (1861) 4 De G F & J 147); *Davies v Austen* (1790) 1 Ves 247; and see *Molloy v French* (1849) 13 I Eq R 261; *Stephens v Venables* (1862) 30 Beav 625; *Re Jones, Christmas v Jones* [1897] 2 Ch 190; *Ballard v Marsden* (1880) 14 ChD 374. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 488.

3 *Stephens v Venables* (1862) 30 Beav 625; *Re Pain, Gustavson v Haviland* [1919] 1 Ch 38.

4 *Morris v Livie* (1842) 1 Y & C Ch Cas 380; *Barnett v Sheffield* (1852) 1 De GM & G 371; *Wilkins v Sibley* (1863) 4 Giff 442; *Cole v Muddle* (1852) 10 Hare 186; *Dibbs v Goren* (1849) 11 Beav 483.

5 *Doering v Doering* (1889) 42 ChD 203.

6 *Irby v Irby (No 3)* (1858) 25 Beav 632; *Molloy v French* (1849) 13 I Eq R 261; cf *British Mutual Investment Co v Smart* (1875) 10 Ch App 567, CA.

7 *Re Eyton, Bartlett v Charles* (1890) 45 ChD 458; *Edgar v Plomley* [1900] AC 431, PC.

8 *Cloutte v Storey* [1911] 1 Ch 18 at 36, CA, per Farwell LJ.

9 *Hooper v Smart, Piper v Piper, Bailey v Piper* (1875) 1 ChD 90; and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 523.

<sup>10</sup> *Phipps v Lovegrove, Prosser v Phipps* (1873) LR 16 Eq 80 at 88; and see *Newman v Newman* (1885) 28 ChD 674.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/66. Benefit of assigned contract subject to burdens.

## **66. Benefit of assigned contract subject to burdens.**

Where the benefit of a contract is assigned, the assignee takes the benefit subject to the rights of the other party to the contract as respects the obligations placed on the assignor by the contract<sup>1</sup> other than those which are contained in purely personal covenants<sup>2</sup>.

1 *Newfoundland Government v Newfoundland Rly Co* (1888) 13 App Cas 199, PC (where set-off of damages for breach of obligation under the contract was allowed); and see *Smith v Parkes* (1852) 16 Beav 115 (where a set-off of partnership debts was allowed against the assignee of a share in a dissolved partnership); *Tooth v Hallett* (1869) 4 Ch App 242; *Bergmann v Macmillan* (1881) 17 ChD 423; *Webb v Smith* (1885) 30 ChD 192, CA. Cf *Brice v Bannister* (1878) 3 QBD 569 at 577, CA; *Re Toward, ex p Moss* (1884) 14 QBD 310, CA; *Drew v Josolyne* (1887) 18 QBD 590, CA; *Re Tout and Finch Ltd* [1954] 1 All ER 127, [1954] 1 WLR 178; *Aries Tanker Corp v Total Transport Ltd, The Aries* [1977] 1 All ER 398, [1977] 1 WLR 185, HL; *Bank of Boston Connecticut v European Grain and Shipping Ltd, The Dominique* [1989] AC 1056, [1989] 1 All ER 545, HL.

2 *Barker v Stickney* [1919] 1 KB 121, CA. Cf PARAS 83, 100.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iii) Assignee takes subject to all Equities/67. Release of equities.

## 67. Release of equities.

The debtor may contract himself out of the right of enforcing against the assignee his equities against the assignor<sup>1</sup>, or may release those equities<sup>2</sup>, or may so conduct himself as to lose his right to enforce them<sup>3</sup>.

1 *Re Blakely Ordnance Co, ex p New Zealand Banking Corp* (1867) 3 Ch App 154 at 158; *Re Natal Investment Co, Financial Corp* Claim (1868) 3 Ch App 355; and see *Ord v White* (1840) 3 Beav 357.

2 *Re Northern Assam Tea Co, ex p Universal Life Assurance Co* (1870) LR 10 Eq 458 at 463.

3 *Higgs v Northern Assam Tea Co Ltd* (1869) LR 4 Exch 387 (where the assignees of debentures, to whom certificates were issued describing them as 'registered proprietors' and who were otherwise dealt with as proprietors, were held not to be liable to a set-off given by the articles of the company in question against the assignor in respect of the debentures), followed in *Re Northern Assam Tea Co, ex p Universal Life Assurance Co* (1870) LR 10 Eq 458 (where the assignees were asked to renew their securities for three years); *Re South Essex Estuary Co, ex p Chorley* (1870) LR 11 Eq 157 (where, the assignment of an invalid bond having been registered without objection in the books of the company issuing it, and judgment having been recovered by consent for principal and interest, it was held that in the winding up the validity of the bond could not be questioned); *Re Hercules Insurance Co, Brunton's Claim* (1874) LR 19 Eq 302 (where the registration of an assignment of an invalid bond was held to amount to a representation that it was valid). See also *Re General Estates Co, ex p City Bank* (1868) 3 Ch App 758 (where the instrument assigned was held either to be a promissory note, or to be represented as free from equities); *Macfarlane v Lister* (1887) 37 ChD 88, CA (where the debtor accepted and delivered to the assignee a written order directing him to pay the assignee out of a fund on which the debtor had prior claims); *Re Gwelo (Matabeleland) Exploration and Development Co Ltd, Williamson's Claim* [1901] 1 IR 38, CA; contrast *Graham v Johnson* (1869) LR 8 Eq 36; and see PARA 61.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iv) Effect of an Equitable Assignment/68. Right of assignee to sue in his own name.

## (iv) Effect of an Equitable Assignment

### 68. Right of assignee to sue in his own name.

An equitable assignment of a chose or thing in action passes to the assignee the right to sue for its recovery<sup>1</sup>. If the chose in action is equitable<sup>2</sup> and the assignment is absolute, the assignee can sue in his own name without making the assignor a party to the claim<sup>3</sup>. All necessary parties must be before the court, however, and accordingly where part of a debt has been the subject of an equitable assignment, neither the assignor nor the assignee can sue the debtor without joining the assignee or assignor as the case may be<sup>4</sup>.

If the chose in action is legal<sup>5</sup>, the assignor, or, if he is dead, his legal personal representative<sup>6</sup>, ought to be a party to the claim either as claimant or as defendant, even where the equitable assignment is absolute<sup>7</sup>, and the more so where the assignment is by way of security only, for he then has a right to redeem<sup>8</sup>. The absence as a party of the person in whom in law the chose in action is vested does not, however, render the claim a nullity<sup>9</sup>. The equitable assignee may be able to obtain an interim injunction<sup>10</sup>, but he will not, save in special circumstances, be able to obtain damages or a perpetual injunction without joining that person as a party<sup>11</sup>. This is a rule of practice for the protection of the debtor and to avoid multiplicity of suits<sup>12</sup>. If the assignor does not bring the claim himself, the assignee is entitled to do so in the name of the assignor, on giving him a proper indemnity against all costs and charges consequent on the use of his name<sup>13</sup>; or, on proving his failure or refusal to sue or to allow the use of his name, may make him a defendant, permission to amend being granted if necessary<sup>14</sup>.

An equitable assignment to a party of rights under a contract of sale does not automatically render him a party to pending arbitration<sup>15</sup>. To succeed to the rights of the assignor in a pending arbitration the assignee must give notice to the other side to perfect the legal assignment and must 'intervene' in the arbitration by giving notice to the arbitrator<sup>16</sup>.

1 *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA.

2 As to what is an equitable chose in action see PARA 3.

3 *Cator v Croydon Canal Co* (1843) 4 Y & C Ex 593; *Fulham v M'Carthy* (1848) 1 HL Cas 703; *Goodson v Ellisson* (1827) 3 Russ 583.

4 *Re Steel Wing Co Ltd* [1921] 1 Ch 349 at 357; *Walter and Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 843, CA. As to non-joinder of parties see **CIVIL PROCEDURE** vol 11 (2009) PARA 207 et seq.

5 As to what choses in action are legal see PARA 3.

6 If a party to a contract assigns his rights in equity before he dies, his personal representatives continue to represent him for the purpose of joining or being joined with the assignee in suing the debtor: *Brandt v Heatig* (1818) 2 Moore CP 184. See also **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 816.

7 *Durham Bros v Robertson* [1898] 1 QB 765 at 769, CA; and see *Cathcart v Lewis* (1792) 1 Ves 463; *HG Harper & Co v J Bland & Co Ltd* (1914) 84 LJB 738; *Performing Right Society v London Theatre of Varieties Ltd* [1924] AC 1, HL; *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA; *Rumput (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines, The Leage* [1984] 2 Lloyd's Rep 259.

8 *Durham Bros v Robertson* [1898] 1 QB 765 at 770, 774, CA. See also *Bruty v Edmundson* (1915) 113 LT 1197.

9 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd*[1905] AC 454, HL; *Performing Right Society v London Theatre of Varieties Ltd*[1922] 2 KB 433, CA (affd [1924] AC 1, HL); *Weddell v JA Pearce & Major*[1988] Ch 26, [1987] 3 All ER 624; *Three Rivers District Council v Bank of England*[1996] QB 292, [1995] 4 All ER 312, CA.

10 *Performing Right Society v London Theatre of Varieties Ltd*[1922] 2 KB 433, CA (affd [1924] AC 1, HL); *Three Rivers District Council v Bank of England*[1996] QB 292, [1995] 4 All ER 312, CA.

11 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL; *Performing Right Society v London Theatre of Varieties Ltd* [1922] 2 KB 433, CA (affd [1924] AC 1, HL); *Central Insurance Co Ltd v Seacalf Shipping Corpn, The Aiolos* [1983] 2 Lloyd's Rep 25, CA; *Weddell v JA Pearce & Major* [1988] Ch 26, [1987] 3 All ER 624; *Three Rivers District Council v Bank of England*[1996] QB 292, [1995] 4 All ER 312, CA.

12 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd*[1905] AC 454, HL; *Performing Right Society v London Theatre of Varieties*[1922] 2 KB 433, CA (affd [1924] AC 1, HL); *Three Rivers District Council v Bank of England* [1996] QB 292, [1995] 4 All ER 312, CA.

13 *Wood v Griffith* (1818) 1 Swan 43 at 56 per Lord Eldon LC; *Pickford v Ewington* (1835) 4 Dowl 453; *Hammond v Messenger* (1838) 9 Sim 327 at 332; *Crouch v Crédit Foncier of England* (1873) LR 8 QB 374 at 380 per Blackburn J; *Turquand v Fearon* (1879) 4 QBD 280, DC. Where it is sought to add the assignor after the claim is brought, his consent in writing was held to be necessary in *Tryon v National Provident Institution* (1886) 16 QBD 678. As to the addition and substitution of parties see now CPR Pt 19; and **CIVIL PROCEDURE** vol 11 (2009) PARA 207 et seq. The assignor's name may be used even where the assignor is bankrupt: *Winch v Keeley* (1787) 1 Term Rep 619; cf *The Wasp* (1867) LR 1 A & E 367.

14 *EM Bowden's Patents Syndicate Ltd v H Smith & Co* [1904] 2 Ch 86 at 91 per Warrington J; affd at [1904] 2 Ch 122, CA.

15 *Baytur SA v Finagro Holding SA*[1992] QB 610, [1999] 4 All ER 129, CA.

16 *Baytur SA v Finagro Holding SA*[1992] QB 610, [1999] 4 All ER 129, CA; *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nicolov* [1990] 2 Lloyd's Rep 11; and see *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep 287.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iv) Effect of an Equitable Assignment/69. Right of assignor to sue.

### **69. Right of assignor to sue.**

An assignor, if the assignment is known, will not be allowed to sue in his own name for himself. He may sue as trustee for the assignee if the assignee so wishes, but in that event he should reveal his representative capacity and if he attempts to recover for himself, even if, for example, only part of the debt has been assigned, he will be required to join the assignee<sup>1</sup>.

<sup>1</sup> *Walter & Sullivan Ltd v J Murphy & Sons Ltd* [1955] 2 QB 584, [1955] 1 All ER 843; *Deposit Protection Board v Barclays Bank plc* [1994] 2 AC 367, sub nom *Deposit Protection Board v Dalia* [1994] 2 All ER 577, HL; *Three Rivers District Council v Bank of England* [1996] QB 292, [1995] 4 All ER 312, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iv) Effect of an Equitable Assignment/70. Liability of debtor after notice.

## **70. Liability of debtor after notice.**

A debtor or fundholder who has received notice of an equitable assignment must withhold all further payments to the assignor unless made with the consent of the assignee<sup>1</sup>, for if he pays to the assignor without such consent he will have to pay over again to the assignee<sup>2</sup>. After notice the debtor or fundholder becomes trustee for the assignee, and cannot obtain a good discharge without the concurrence of the assignee<sup>3</sup>. If the assignor has commenced proceedings against him, he may interplead<sup>4</sup>, and cannot justify payment to the assignor on the ground that the assignee has refused to indemnify him<sup>5</sup>. If, however, the assignor disputes the assignment of a debt payable by instalments, the whole amount being due on default in payment of any instalment, the debtor may continue to pay the instalments to the assignor until the assignee has obtained an injunction<sup>6</sup>. Payments made by the debtor to the assignee, without notice that the latter has himself assigned over, will be good against the sub-assignee<sup>7</sup>.

<sup>1</sup> *Stephens v Venables* (1862) 30 Beav 625; *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 462, HL.

<sup>2</sup> *Jones v Farrell* (1857) 1 De G & J 208; *Brice v Bannister* (1878) 3 QBD 569 at 575, CA; cf *Re Pawson's Settlement*, *Higgins v Pawson* [1917] 1 Ch 541; *Malayawata Steel Berhad v Government of the Federation of Malaysia* (12 May 1980, unreported), PC.

<sup>3</sup> *Dearle v Hall*, *Loveridge v Cooper* (1828) 3 Russ 1 at 12; *West of England Bank v Batchelor* (1882) 51 LJ Ch 199; *Kelly v Selwyn* [1905] 2 Ch 117 at 121; *Société Générale de Paris v Tramways Union Co* (1884) 14 QBD 424 at 446, CA (affd but not on this point sub nom *Société Générale de Paris v Walker* (1885) 11 App Cas 20, HL); *Liquidation Estates Purchase Co Ltd v Willoughby* [1898] AC 321 at 336, HL.

<sup>4</sup> *Robinson v Jenkins* (1890) 24 QBD 275 at 279, CA, per Fry LJ; and see *Prudential Assurance Co v Thomas* (1867) 3 Ch App 74.

<sup>5</sup> *Jones v Farrell* (1857) 1 De G & J 208.

<sup>6</sup> *Aplin v Cates* (1860) 30 LJ Ch 6.

<sup>7</sup> *Stocks v Dobson* (1853) 4 De GM & G 11.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(4) EQUITABLE ASSIGNMENTS/(iv) Effect of an Equitable Assignment/71. When assignee may give valid discharge.

**71. When assignee may give valid discharge.**

The equitable assignee of a legal chose or thing in action cannot give a valid discharge to the original debtor unless expressly empowered so to do<sup>1</sup>.

<sup>1</sup> *Durham Bros v Robertson* [1898] 1 QB 765, CA; and see *Jones v Farrell* (1857) 1 De G & J 208 at 218.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(i) Choses in Action within the Act/72. Provisions for legal assignment of debts and other legal things in action.

## **(5) ASSIGNMENTS UNDER THE**

### **(i) Choses in Action within the Act**

#### **72. Provisions for legal assignment of debts and other legal things in action.**

Provided certain conditions are complied with, any debt or other legal chose or thing in action<sup>1</sup> may be assigned so as to vest in the assignee the legal right to the same and all the remedies for it, with power to give a good discharge without the concurrence of the assignor<sup>2</sup>.

The conditions which must be complied with are:

- 103 (1) the assignment must be in writing under the hand of the assignor;
- 104 (2) the assignment must be absolute, and not purporting to be by way of charge only; and
- 105 (3) express notice in writing of the assignment must be given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim the debt or thing in action<sup>3</sup>.

Such an assignment takes effect from the date of the notice<sup>4</sup> and will be subject to equities having priority over the right of the assignee<sup>5</sup>.

The provisions described above do not affect the enactments<sup>6</sup> enabling assignees of policies of life assurance granted by assurance companies to sue on them in their own names<sup>7</sup>; nor do they apply:

- 106 (a) to any transfer of title to uncertificated units of a security<sup>8</sup> by means of a relevant system<sup>9</sup> or to any disposition or assignment of an interest in uncertificated units of a security title to which is held by a relevant nominee<sup>10</sup>;
- 107 (b) (if they would otherwise do so) in relation to a financial collateral arrangement<sup>11</sup>, to the extent that they require an assignment to be signed by the assignor or a person authorised on its behalf, in order to be effectual in law<sup>12</sup>.

1 See PARAS 74-75.

2 Law of Property Act 1925 s 136(1).

3 Law of Property Act 1925 s 136(1).

4 Law of Property Act 1925 s 136(1); and see PARA 81. See also *Savva v Jaikarn*[2005] EWHC 891 (Ch), [2005] All ER (D) 202 (Apr).

5 Law of Property Act 1925 s 136(1). As to these equities see PARA 83.

6 I.e. the enactments of the Policies of Assurance Act 1867: see **INSURANCE** vol 25 (2003 Reissue) PARA 548 et seq.

7 Law of Property Act 1925 s 136(2). The effect is that a policy of life assurance granted by an assurance company may be assigned at law by virtue of the Policies of Assurance Act 1867, and also by virtue of the Law of Property Act 1925 s 136(1): see **INSURANCE** vol 25 (2003 Reissue) PARA 548 et seq.

8 As to the meaning of 'unit' in relation to a security, and 'uncertificated' in relation to a unit of a security, see the Uncertificated Securities Regulations 2001, SI 2001/3755, reg 3(1); and **COMPANIES** vol 14 (2009) PARA 421.

9 As to the meaning of 'relevant system' see the Uncertificated Securities Regulations 2001, SI 2001/3755, regs 2(1), 3(1); and **COMPANIES** vol 14 (2009) PARA 421.

10 Uncertificated Securities Regulations 2001, SI 2001/3755, reg 38(5). As to the meaning of 'relevant nominee' for these purposes see reg 38(6); and **COMPANIES** vol 14 (2009) PARA 421.

11 'Financial collateral arrangement' means a title transfer financial collateral arrangement or a security financial collateral arrangement, whether or not these are covered by a master agreement or general terms and conditions; and 'financial collateral' means either cash or financial instruments: Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 3. As to the meanings of 'title transfer financial collateral arrangement', 'security financial collateral arrangement' and 'financial instruments' see reg 3; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 526.

12 Financial Collateral Arrangements (No 2) Regulations 2003, SI 2003/3226, reg 4(3).

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(i) Choses in Action within the Act/73. General effect of statutory provisions.

### **73. General effect of statutory provisions.**

The provisions relating to assignment<sup>1</sup> did not create any new rights, but they enabled the legal right to a debt or other chose or thing in action to be transferred to the assignee, together with all legal remedies, including the right to sue in his own name<sup>2</sup>. They have not made assignable contracts which were not assignable in equity before<sup>3</sup>; nor, on the other hand, have they impaired the efficacy of equitable assignments which would previously have been valid<sup>4</sup>. The statutory provisions effected an improvement in the position of a donee of a legal chose in action by enabling him to sue at law in his own name as assignee without regard to whether or not the assignment was for valuable consideration<sup>5</sup>. To be a valid assignment within the provisions described above, an assignment must be of the whole debt or chose in action<sup>6</sup>.

1 The provisions contained in the Law of Property Act 1925 s 136(1); see PARA 72.

2 *Schroeder v Central Bank of London Ltd* (1876) 24 WR 710; *Walker v Bradford Old Bank* (1884) 12 QBD 511; *Read v Brown* (1888) 22 QBD 128 at 132, CA. See also *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, *Associated Portland Cement Manufacturers (1900) Ltd v Tolhurst* [1902] 2 KB 660, CA (affd [1903] AC 414, HL); *Stoddart v Union Trust Ltd* [1912] 1 KB 181 at 188, CA, per Vaughan Williams LJ; and PARA 82.

3 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd*, *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co* [1903] AC 414 at 424, HL.

4 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454 at 461, HL.

5 *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104.

6 *Williams v Atlantic Assurance Co Ltd* [1933] 1 KB 81, CA. There may, however, be an equitable assignment of a portion of a specified fund: see PARA 27.



Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT  
 1925/(i) Choses in Action within the Act/74. Meaning of 'debts'.

#### 74. Meaning of 'debts'.

To be within the relevant provisions of the Law of Property Act 1925<sup>1</sup>, the debt must be a debt of a definite sum<sup>2</sup>. An assignment of the balance which may remain after satisfying a third party debt order is effective and attaches to the balance in the hands of the debtor after payment into court under the order<sup>3</sup>.

An absolute assignment of a specified future debt is within the Act<sup>4</sup>; as, for example, the balance standing at any time after the date of the assignment to the credit of the assignor at a bank<sup>5</sup>, or future rents<sup>6</sup>, or a retention fund under a building contract<sup>7</sup>.

Examples of debts within the Act include the following: a debt due on the covenant in a mortgage deed<sup>8</sup>; rent already accrued due under a lease<sup>9</sup>; a judgment debt<sup>10</sup>; a balance<sup>11</sup>, or a deposit<sup>12</sup>, standing to the assignor's credit at his bank; the amount due on a solicitor's bill of costs, even before the delivery of a signed bill<sup>13</sup>; a debt due from a solicitor to a town agent<sup>14</sup>; a debt certified as due from a company in liquidation<sup>15</sup>; and the balance due to a legatee of his share in the residuary estate of a deceased person<sup>16</sup>.

1    le the Law of Property Act 1925 s 136(1): see PARA 72.

2    *Jones v Humphreys* [1902] 1 KB 10 at 13 (where an assignment of so much of a salary as should be necessary to pay a definite sum, 'and any further sums in which I may hereafter become indebted to you', was held not within the provisions).

3    *Yates v Terry* [1902] 1 KB 527, CA. Third party debt orders were formerly known as 'garnishee orders'. As to third party debt orders see **CIVIL PROCEDURE** vol 12 (2009) PARA 1411 et seq.

4    *Jones v Humphreys* [1902] 1 KB 10. Cf *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA (instalments of purchase-money of furniture).

5    *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511.

6    *Knill v Prowse* (1884) 33 WR 163; cf *Southwell v Scotter* (1880) 49 LJQB 356, CA.

7    *G & T Earle Ltd v Hemsworth RDC* (1928) 140 LT 69, CA.

8    *Dibb v Walker* [1893] 2 Ch 429.

9    *Knill v Prowse* (1884) 33 WR 163.

10   *Goodman v Robinson* (1886) 18 QBD 332; *Harley v Samson* (1914) 30 TLR 450.

11   *Walker v Bradford Old Bank Ltd* (1884) 12 QBD 511.

12   *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104.

13   *Ingle v M'Cutchan* (1884) 12 QBD 518, DC.

14   *Burlinson v Hall* (1884) 12 QBD 347, DC.

15   *Re Moss Bay Hematite Iron and Steel Co* (1892) 8 TLR 475, CA.

16   *Harding v Harding* (1886) 17 QBD 442, DC.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(i) Choses in Action within the Act/75. Rights included in 'other legal things in action'.

## 75. Rights included in 'other legal things in action'.

It has been held that the term 'legal thing in action' in the Law of Property Act 1925<sup>1</sup> is not confined to legal things in action strictly so called, but includes any right which the common law looked on as not assignable by reason of its being a chose in action, but which a court of equity dealt with as being assignable<sup>2</sup>.

The following things in action are within the Act: a claim to compensation<sup>3</sup> in respect of lands injuriously affected<sup>4</sup>; the benefit of a contract to supply goods of a particular kind<sup>5</sup>; the benefit of a contract for the purchase of a reversionary interest<sup>6</sup>; the benefit of a covenant by the tenant of a hotel to purchase all beer from a particular brewery<sup>7</sup>; the right to salary under a contract of service<sup>8</sup>; a claim to repayment of value added tax<sup>9</sup>; and, where the client seeks to preserve and rely upon the trust and confidence he has in a particular solicitor, a conditional fee agreement when that solicitor moves to a new firm<sup>10</sup>.

On the other hand, the following things in action are not within the Act: the equity of redemption in a mortgage debt already assigned by way of mortgage<sup>11</sup>; the right to sue for damages for a breach of contract already committed<sup>12</sup>, or for damages for tort<sup>13</sup>; the benefit of a contract to lend money<sup>14</sup>; contracts involving special personal qualifications on the part of the person claiming performance<sup>15</sup>; the right of a party to a claim to make an application to the judge for an order for costs which the judge may or may not direct<sup>16</sup>; and future claims such as an insurance claim which is merely an unwished-for future possibility dependent upon some future casualty<sup>17</sup>.

Shares in incorporated companies are only transferable by the methods provided by the special legislation applicable to them, and are not within the Act<sup>18</sup>.

1    Ie in the Law of Property Act 1925 s 136(1): see PARA 72.

2    *Torkington v Magee* [1902] 2 KB 427 at 430-431, DC (revsd on another point [1903] 1 KB 644, CA); *Re Pain, Gustavson v Haviland* [1919] 1 Ch 38 at 44 per Younger J. See also *Victoria Insurance Co v King* (1895) 6 QJL 203 (affd without expression of opinion on this point sub nom *King v Victoria Insurance Co* [1896] AC 250, PC); *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 619 per Farwell J (who seems to have regarded the statement of the effect of the judgment in the Queensland Court in *Victoria Insurance Co v King* (1895) 6 QJL 203 at 254 as part of the judgment of the Privy Council; but see at 256; and see *Torkington v Magee* [1902] 2 KB 427 at 433, DC, per Channell J (revsd on another point [1903] 1 KB 644, CA)); *Cia Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216. See *Trendtex Trading Corp v Crédit Suisse* [1980] QB 629, [1980] 3 All ER 721, CA (affd [1982] AC 679, [1981] 3 All ER 520, HL); see in particular per Lord Denning MR in the Court of Appeal at 657 and 744; cf *Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613, CA.

3    Ie under the Lands Clauses Consolidation Act 1845 s 68 or the Compulsory Purchase Act 1965 s 10: see **COMPULSORY ACQUISITION OF LAND** vol 18 (2009) PARA 718.

4    *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260 at 275, CA.

5    *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd, Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd and Imperial Portland Cement Co* [1903] AC 414, HL. The contract must not be of a personal nature: *Kemp v Baerselman* [1906] 2 KB 604, CA; *Cooper v Micklefield Coal and Lime Co Ltd, Cooper v Rayner* (1912) 107 LT 457.

6    *Torkington v Magee* [1902] 2 KB 427 at 431-432, 434, DC (revsd on another point [1903] 1 KB 644, CA); and see *Ogdens Ltd v Weinberg* (1906) 95 LT 567, HL.

- 7 *Manchester Brewery Co v Coombs* [1901] 2 Ch 608.
- 8 *Horwood v Millar's Timber and Trading Co Ltd* [1917] 1 KB 305, CA.
- 9 *Midlands Co-operative Society Ltd v Revenue and Customs Comrs* [2008] EWCA Civ 305, [2008] STC 1803, (2008) Times, 22 April.
- 10 *Jenkins v Young Bros Transport Ltd* [2006] EWHC 151 (QB), [2006] 2 All ER 798, [2006] 1 WLR 3189.
- 11 *Cronk v M'Manus* (1892) 8 TLR 449.
- 12 *May v Lane* (1894) 64 LJQB 236, CA; *Torkington v Magee* [1902] 2 KB 427 at 434, DC (revsd on another point [1903] 1 KB 644, CA); cf *Ogdens Ltd v Weinberg* (1906) 95 LT 567 at 568, HL, per Lord Davey (where an assignment of such a right was held good, apparently, because incidental to the transfer of a business); and see *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260 at 271, CA; *Williams v Protheroe* (1829) 5 Bing 309. See also PARAS 100-101.
- 13 Eg for assault: see *May v Lane* (1894) 64 LJQB 236 at 238, CA, per Rigby LJ. An assignment by an assured to his underwriter of the assured's rights against a contract breaker or tortfeasor is, however, enforceable by the underwriter in his own name: *Cia Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216, following *King v Victoria Insurance Co* [1896] AC 250, PC (where a right of action for damages for negligence was held within the corresponding Queensland Act). See also PARAS 98-99.
- 14 *May v Lane* (1894) 64 LJQB 236, CA. See *Western Wagon and Property Co v West* [1892] 1 Ch 271.
- 15 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd, Associated Portland Cement Manufacturers (1900) Ltd v Tolhurst* [1902] 2 KB 660 at 670, 677, CA (affd [1903] AC 414, HL); *Kemp v Baerselman* [1906] 2 KB 604, CA; and see PARA 100.
- 16 *Re Marly Laboratory Ltd's Application* [1952] 1 All ER 1057, 69 RPC 156, CA.
- 17 *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257.
- 18 *Torkington v Magee* [1902] 2 KB 427 at 430, DC (revsd on another point [1903] 1 KB 644, CA).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(ii) Assignments within the Act/76. Necessity for assignment to be absolute and not to purport to be by way of charge.

## **(ii) Assignments within the Act**

### **76. Necessity for assignment to be absolute and not to purport to be by way of charge.**

In order that an assignment may be within the Law of Property Act 1925 it must be absolute, and must not purport to be by way of charge only<sup>1</sup>.

An assignment which is conditional and not absolute, as, for example, an assignment expressed to be until money advanced is repaid<sup>2</sup>, or an assignment of a policy of life insurance authorising the assignee to draw the insurance money in the event of the assignor predeceasing the assignee<sup>3</sup>, is not within the Act. An assignment of salary to become due to the assignor under his employment with third parties is, however, an absolute assignment<sup>4</sup>.

The existence of a trust in favour of the assignor, whether of the whole debt assigned<sup>5</sup> or of the surplus after retainer of a definite sum by the assignee<sup>6</sup>, does not prevent the assignment being absolute, if it is absolute in point of form. Likewise a promise to pay the assignor a sum of money calculated according to the amount received by the assignee as the fruits of the assignment can have no effect at all on the nature of the assignment if otherwise absolute<sup>7</sup>.

A document given by way of charge is a document which only gives a right to payment out of a particular fund or property, and does not absolutely transfer the fund or property<sup>8</sup>. In order to determine whether an assignment purports to be by way of charge only, all the terms of the instrument must be considered, and, whatever may be the phraseology adopted in some particular part, the intention must be determined on consideration of the whole<sup>9</sup>. It is immaterial whether the consideration is a fixed sum or a current account, nor does it matter that the assignee has obtained a power of attorney and a covenant for further assurance<sup>10</sup>. The fact that the assignment is expressed to be by way of security is not by itself sufficient to make it purport to be by way of charge only<sup>11</sup>, but such an expression coupled with other circumstances may have that effect<sup>12</sup>. An assignment of so much of a future debt as shall be enough to satisfy an uncertain future indebtedness is an assignment by way of charge only<sup>13</sup>.

A mortgage in ordinary form which transfers the property with a proviso for redemption and reconveyance is an absolute assignment within the Act<sup>14</sup>; and where there is an assignment of a debt, absolute in form but in fact made by way of security, it will be within the Act, although an equitable right to reassignment on redemption will be implied<sup>15</sup>. Where, following the assignment of insurances to the mortgagee, the insurances continue to protect the owner's interests in respect of any losses and liabilities which he had incurred as mortgagor and owner or as operator of a vessel, the assignment does not constitute an absolute assignment<sup>16</sup>.

1 Law of Property Act 1925 s 136(1); *Durham Bros v Robertson* [1898] 1 QB 765 at 771, CA. It seems to follow that there cannot be two legal assignments of the same thing in action: *Ellerman Lines Ltd v Lancaster Maritime Co Ltd, The Lancaster* [1980] 2 Lloyd's Rep 497 at 503 per Robert Goff J. See also *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257.

2 *Durham Bros v Robertson* [1898] 1 QB 765 at 773, CA.

3 *Re Williams, Williams v Ball* [1917] 1 Ch 1, CA.

- 4 *Horwood v Millar's Timber and Trading Co Ltd* [1916] 2 KB 44 at 48 per Lush J, and at 53 per Sankey J; affd on other grounds [1917] 1 KB 305, CA.
- 5 *Comfort v Betts* [1891] 1 QB 737, CA (where several creditors of a debtor assigned their debts to a trustee for collection); *Wiesener v Rackow* (1897) 76 LT 448, CA; *Fitzroy v Cave* [1905] 2 KB 364, CA.
- 6 *Burlinson v Hall* (1884) 12 QBD 347; *Bank of Liverpool and Martins Ltd v Holland* (1926) 43 TLR 29; *G & T Earle Ltd v Hemsworth RDC* (1928) 44 TLR 605 (affd 44 TLR 758, CA).
- 7 *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA; *Freightex Ltd v International Express Co Ltd* (15 April 1980, unreported), CA.
- 8 *Tancred v Delagoa Bay and East Africa Rly Co* (1889) 23 QBD 239 at 242, DC.
- 9 *Hughes v Pump House Hotel Co* [1902] 2 KB 190 at 193, CA; *Court Line Ltd v Aktiebolaget Götaverken, The Halcyon the Great* [1984] 1 Lloyd's Rep 283.
- 10 *Hughes v Pump House Hotel Co* [1902] 2 KB 190 at 197-198, CA. It must not be by way of charge, under a power of attorney: see *Mercantile Bank of London v Evans* [1899] 2 QB 613 at 616, CA.
- 11 *Hughes v Pump House Hotel Co* [1902] 2 KB 190, CA; cf *Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613 at 617, CA, per Vaughan Williams LJ; *Knill v Prowse* (1884) 33 WR 163.
- 12 *Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613 at 616, CA (where the right of suing on the contract remained in the assignor).
- 13 *Jones v Humphreys* [1902] 1 KB 10 at 13-14. A direction to pay a definite sum out of money due or to become due has been said to be only a charge: *Durham Bros v Robertson* [1898] 1 QB 765 at 774, CA; and see further note 10.
- 14 *Tancred v Delagoa Bay and East Africa Rly Co* (1889) 23 QBD 239, DC, disapproving *National Provincial Bank v Harle* (1881) 6 QBD 626, and following *Burlinson v Hall* (1884) 12 QBD 347, DC; *Durham Bros v Robertson* [1898] 1 QB 765, CA; *Hughes v Pump House Hotel Co* [1902] 2 KB 190, CA; *Bateman v Hunt* [1904] 2 KB 530, CA (a sub-mortgage); *Care Shipping Corpn v Latin American Shipping Corpn, The Cebu* [1983] QB 1005, [1983] 1 All ER 1121; *L/M International Construction Inc (now Bovis International Inc) v Circle Ltd Partnership* (1995) 49 ConLR 12, [1995] NPC 128, CA; cf *Mercantile Bank of London Ltd v Evans* [1899] 2 QB 613, CA.
- 15 *Durham Bros v Robertson* [1898] 1 QB 765 at 772, CA; *Russell & Co Ltd v Austin Fryers* (1909) 25 TLR 414, DC; cf *Ibberson v Neck* (1886) 2 TLR 427. See *Court Line Ltd v Aktiebolaget Götaverken, The Halcyon the Great* [1984] 1 Lloyd's Rep 283 at 288, in which Staughton J cited this paragraph in a previous edition of this title.
- 16 *Raiffeisen Zentralbank Österreich AG v Five Star General Trading LLC* [2001] EWCA Civ 68, [2001] QB 825, [2001] 3 All ER 257.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
ASSIGNMENT OF CHOSSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT  
1925/(ii) Assignments within the Act/77. Voluntary assignment.

### **77. Voluntary assignment.**

Provided that the statutory conditions<sup>1</sup> are complied with, an assignment which is voluntary<sup>2</sup> is within the Law of Property Act 1925<sup>3</sup>. Even if the assignment is a voluntary one which would not be enforceable in equity by the assignee against the assignor, the debtor whose debt has been assigned cannot set this up as a ground of defence to a claim by the assignee<sup>4</sup>.

1 See PARA 72.

2 *Harding v Harding* (1886) 17 QBD 442, DC; *Lee v Magrath* (1882) 10 LR Ir 45 at 49 (reversed on another point at 10 LR Ir 313, CA); *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104.

3 In the Law of Property Act 1925 s 136(1): see PARA 72.

4 *Walker v Bradford Old Bank* (1884) 12 QBD 511.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(ii) Assignments within the Act/78. Object of assignment.

### **78. Object of assignment.**

The object with which the assignment is made is immaterial to the question whether or not the assignment is valid<sup>1</sup>. Thus an assignment of debts, taken to enable the assignee to make the debtor a bankrupt and so disqualify him from being director of a company, is not by reason of its object invalid<sup>2</sup>.

1 *Wiesener v Rackow* (1897) 76 LT 448, CA, where the assignment was to a debt collecting agency, the object being to enable an action to be brought in England for the benefit of the assignor, a foreigner resident abroad.

2 *Fitzroy v Cave* [1905] 2 KB 364, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(ii) Assignments within the Act/79. Form of assignment.

## 79. Form of assignment.

The assignment must be in writing under the hand of the assignor in order to be within the Law of Property Act 1925<sup>1</sup>. The fact that the assignment is also by deed does not take it out of the operation of the Act<sup>2</sup>. It is thought that signature by an agent is not sufficient<sup>3</sup>. Apart from this requirement of writing, no particular form of assignment is required, but, whatever its form, the document must be one which amounts to an absolute assignment<sup>4</sup>. A mere statement of an intention to assign is not sufficient<sup>5</sup>. A direction<sup>6</sup> or order<sup>7</sup> by the creditor to the debtor to pay the assignee may be sufficient, as when a promissory note is indorsed to a particular person and handed over<sup>8</sup>. An order to pay as expressed in a cheque is not within the Act<sup>9</sup>, and a direction to a debtor to pay to a bank all moneys payable to the creditor under an agreement, although expressed to be irrevocable, does not amount to an assignment of the moneys if the bank has not been informed of the arrangement between creditor and debtor, as the direction, contrary to its terms, is in fact revocable<sup>10</sup>.

1 See the Law of Property Act 1925 s 136(1); and PARA 72.

2 See *Marchant v Morton, Down & Co* [1901] 2 KB 829 at 832; *Torkington v Magee* [1902] 2 KB 427, DC (revsd on another point [1903] 1 KB 644, CA).

3 See *Wilson v Wallani* (1880) 5 Ex D 155 (a case on the Bankruptcy Act 1869 s 23 (repealed); see now the Insolvency Act 1986 ss 178, 315 (disclaimer of onerous property); and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 475; **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARAS 866, 867).

4 *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295 at 299, CA, per Jenkins LJ; *Kaukomarkkinat O/Y v 'Elbe' Transport-Union GmbH, The Kelo* [1985] 2 Lloyd's Rep 85; and see *Re Miller, Gibb & Co Ltd* [1957] 2 All ER 266, [1957] 1 WLR 703.

5 *Sycamore Sandpits Developments Ltd v Phoenix Assurance Co Ltd* (23 May 1986, unreported), QBD.

6 *Harding v Harding* (1886) 17 QBD 442, DC. See also PARA 37 note 3.

7 Where a deceased person left a deposit receipt, not indorsed, for £500 deposited in the bank, a written order directing the bank to pay the £500 to a named individual, and a letter to that individual saying that he wished to give her the £500, there was held to be a good assignment: *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104. See also *Brice v Bannister* (1877) 3 QBD 569 at 572-575 per Lord Coleridge CJ; on appeal (1878) 3 QBD 569 at 575, CA (where the assignment was apparently treated as an equitable assignment).

8 *Lee v Magrath* (1882) 10 LR Ir 45; on appeal 10 LR Ir 313, CA (revsd, but not on this point).

9 *Schroeder v Central Bank of London Ltd* (1876) 24 WR 710; cf *Hopkinson v Forster* (1874) LR 19 Eq 74. See also the Bills of Exchange Act 1882 s 53(1); and PARA 38 text and note 1.

10 *Curran v Newpark Cinemas Ltd* [1951] 1 All ER 295, CA; cf PARA 26 text and notes 4, 6.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT  
 1925/(iii) Notice and Effect of Assignment/80. Notice in writing.

### **(iii) Notice and Effect of Assignment**

#### **80. Notice in writing.**

In order that the assignee may obtain the benefit of the Law of Property Act 1925, express notice in writing of the assignment must be given to the debtor, trustee or other person<sup>1</sup> from whom the assignor would have been entitled to claim the debt or the chose or thing in action<sup>2</sup>. Where there are joint debtors and covenantors, notice to one who is a bankrupt is unnecessary<sup>3</sup>. The notice need not be formal<sup>4</sup>, and need not be written with the intention that it should perform the function of giving notice<sup>5</sup>; but it must be given even though the debtor cannot read<sup>6</sup>. The assignment only operates under the Act as from the date of the notice<sup>7</sup>, that is, the date on which it is received by or on behalf of the debtor<sup>8</sup>. If the debt is released or extinguished by payment or otherwise before notice is given, there is no transfer under the Act<sup>9</sup>.

It has been held that if the date of the assignment is wrongly stated the notice is ineffectual<sup>10</sup>, though if no date is given at all the notice may be good<sup>11</sup>. It may also be ineffectual if it does not state the amount of the debt correctly<sup>12</sup>.

The Act prescribes no limit of time within which the notice must be given<sup>13</sup>, and a notice given after the death of the assignor<sup>14</sup>, or after the death of the assignee<sup>15</sup>, is effectual.

The Act does not prescribe that the notice must be given by any particular person<sup>16</sup>. Thus it may be given by the personal representatives of a deceased assignee, even though no notice has been given by him or by the original or any intermediate assignee<sup>17</sup>.

In the case of a company, notice to the manager at the works, though not communicated by him to the head office, may be sufficient<sup>18</sup>.

It is thought that where there have been two assignments of the same debt, of both of which notice has been given to the debtor, but the assignee under the second assignment, without having notice of the first, gave notice to the debtor of his assignment before notice was given of the first assignment, he will have priority<sup>19</sup>.

If a debtor has given a negotiable instrument, for example a cheque, in payment of the debt, a subsequent notice that the debt has been assigned may be disregarded by the debtor even if the creditor still holds the cheque<sup>20</sup>.

1 *Amalgamated General Finance Co Ltd v CE Golding & Co Ltd* [1964] 2 Lloyd's Rep 163 (no legal assignment because no notice to underwriters); *Shaw v Applegate* [1978] 1 All ER 123, [1977] 1 WLR 970, CA (equitable assignment of benefit of negative covenant became legal when notice given to covenantor). It seems that notice should be served on every person who would be a necessary party to a claim on the debt: see *Josselson v Borst* [1938] 1 KB 723 at 736, [1937] 3 All ER 722 at 727-728, CA, per Greer LJ, and at 740 and 732 per Slessor LJ. Notice should, accordingly, be given to all trustees: see PARA 52. In relation to a cause of action in tort see also *Perry v Tendring District Council* [1985] 1 EGLR 260; *RL Polk & Co (Great Britain) Ltd v Edward Hill & Partners* [1988] 1 EGLR 142.

2 Law of Property Act 1925 s 136(1). An assignment will be good in equity as between assignor and assignee without notice: *Gorringe v Irwell India Rubber and Gutta Percha Works* (1886) 34 ChD 128, CA. See further PARA 41. The suspensory character of the proviso in *Gatoil Anstalt v Omennial Ltd* [1980] 2 Lloyd's Rep 489 meant that the notice of assignment did not satisfy the requirements of the Law of Property Act 1925 s 136.

3 Insolvency Act 1986 s 345(4); *Josselson v Borst* [1938] 1 KB 723, [1937] 3 All ER 722, CA.

- 4 *Denney, Gasquet and Metcalfe v Conklin* [1913] 3 KB 177.
- 5 *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607, [1968] 3 All ER 824, CA.
- 6 *Hockley and Papworth v Goldstein* (1920) 90 LJB 111 (where the debtor's inability to read was well known to all the parties, and clear oral notice was given but was ineffective).
- 7 Law of Property Act 1925 s 136(1).
- 8 *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1, [1942] 1 All ER 404; *Holwell Securities Ltd v Hughes* [1973] 2 All ER 476, [1973] 1 WLR 757 (affd [1974] 1 All ER 161, [1974] 1 WLR 155, CA); and see PARA 81.
- 9 *Lee v Magrath* (1882) 10 LR Ir 313 at 319, 326, CA (where the transferor appointed the debtor her executor); *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104 (payment of interest to assignor of fund before notice of assignment of fund). Cf *Jenkins v Jenkins* [1928] 2 KB 501.
- 10 *Stanley v English Fibres Industries Ltd* (1899) 68 LJB 839; *WF Harrison & Co Ltd v Burke* [1956] 2 All ER 169, [1956] 1 WLR 419, CA. It is not so in the case of an equitable assignment: *Whittingstall v King* (1882) 46 LT 520.
- 11 *Van Lynn Developments Ltd v Pelias Construction Co Ltd* [1969] 1 QB 607, [1968] 3 All ER 824, CA.
- 12 *WF Harrison & Co Ltd v Burke* [1956] 2 All ER 169, [1956] 1 WLR 419, CA, obiter per Denning LJ.
- 13 See *Bateman v Hunt* [1904] 2 KB 530 at 538, CA.
- 14 *Walker v Bradford Old Bank* (1884) 12 QBD 511; *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104.
- 15 *Bateman v Hunt* [1904] 2 KB 530, CA.
- 16 See *Bateman v Hunt* [1904] 2 KB 530 at 538, CA.
- 17 *Bateman v Hunt* [1904] 2 KB 530, CA (where the notice was given by the executor of a sub-assignee).
- 18 *William Brandt's Sons & Co v Dunlop Rubber Co Ltd* [1905] AC 454, HL (a decision on an equitable assignment).
- 19 See *Marchant v Morton, Down & Co* [1901] 2 KB 829.
- 20 *Bence v Shearman* [1898] 2 Ch 582, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(iii) Notice and Effect of Assignment/81. Transfer of legal right.

### **81. Transfer of legal right.**

An assignment operating under the Law of Property Act 1925 transfers the legal right to the chose or thing in action to the assignee as from the date of the notice<sup>1</sup> with power to give a good discharge for the same<sup>2</sup>. The thing in action no longer belongs to the assignor, and he cannot sue for it<sup>3</sup>.

There is no machinery provided by the Act for the reverter of the legal right to the assignor on the performance of a condition; the only method is by retransfer, followed by notice in writing to the debtor as in the case of the first transfer<sup>4</sup>.

1 *Cia Colombiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216 (proceedings brought by assignees who had not yet given notice of assignment; proceedings brought by wrong party); *Savva v Jaikarn* [2005] EWHC 891 (Ch), [2005] All ER (D) 202 (Apr) (completed assignment could not be repudiated as a result of conduct after the date of the notice). But note that dicta of Roskill J were not followed by Scott J in *Weddell v JA Pearce & Major* [1988] Ch 26, [1987] 3 All ER 624. See PARA 68. See also PARA 80 text and notes 7-8.

2 Law of Property Act 1925 s 136(1); *Torkington v Magee* [1902] 2 KB 427 at 432, DC (revsd on another point [1903] 1 KB 644, CA); *Durham Bros v Robertson* [1898] 1 QB 765 at 773, CA.

3 *Read v Brown* (1888) 22 QBD 128 at 132, CA; *Bovis Lend Lease Ltd (formerly Bovis Construction Ltd) v Saillard Feller & Partners* (2001) 77 ConLR 134, [2001] All ER (D) 422 (Jul).

4 *Durham Bros v Robertson* [1898] 1 QB 765 at 773, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(iii) Notice and Effect of Assignment/82. Transfer of remedies.

## 82. Transfer of remedies.

An assignment operating under the Law of Property Act 1925 passes all legal and other remedies for the chose or thing in action<sup>1</sup>. The primary result is that the assignee can bring a claim in his own name where previously he could only have sued in the name of the assignor<sup>2</sup>; but the assignee can sue in his own name only in cases in which before the Act he could have sued in the name of the assignor<sup>3</sup>. He can present a petition in bankruptcy<sup>4</sup>, but, if he is only a trustee, the beneficial owner, if not under a disability, must join in the petition<sup>5</sup>. An assignee, whether legal or equitable, can present a petition for winding up a company<sup>6</sup>, but he cannot do so if the assignment purports to be of part of the debt only unless it amounts to an equitable assignment of that part<sup>7</sup>. The assignee can prove in liquidation of a company although the debt was assigned after the assignor had put in a proof<sup>8</sup>. The assignee of a debt owned by a deceased debtor is entitled, where the executors renounce probate, to a grant of administration with will annexed<sup>9</sup>. The assignee of a judgment debt may enforce payment by proceedings for a third party debt order<sup>10</sup>, or, it seems, by writ of execution<sup>11</sup>, or by process to enforce a judgment in the county court, provided that he complies with the formalities prescribed by the rules of court<sup>12</sup>; but where the assignor has obtained judgment against the debtor in the county court, and the goods of the debtor are taken in execution and sold, the assignee cannot make a claim<sup>13</sup> to the proceeds of the sale<sup>14</sup>. Where a contract is assignable, an arbitration clause is assigned with the contract<sup>15</sup>.

A debtor who takes from a third party an assignment of an independent debt owed by his creditor to that third party can set it off in proceedings brought against him by his creditor<sup>16</sup>, unless when he takes the assignment he has notice that the claim against him has been assigned to another<sup>17</sup>.

1 Law of Property Act 1925 s 136(1).

2 *Marchant v Morton, Down & Co* [1901] 2 KB 829 at 832; and see *King v Victoria Insurance Co* [1896] AC 250 at 254, 256, PC; *Manchester Brewery Co v Coombs* [1901] 2 Ch 608 at 619; *Read v Brown* (1888) 22 QBD 128 at 131-132, CA; *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104 at 111.

3 *Marchant v Morton, Down & Co* [1901] 2 KB 829; *Torkington v Magee* [1902] 2 KB 427 at 435, DC (revsd on another point [1903] 1 KB 644, CA).

4 See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 142.

5 *Re Adams, ex p Culley* (1878) 9 ChD 307, CA; *Re Hastings, ex p Dearle* (1884) 14 QBD 184, CA; and see *Re Macoun* [1904] 2 KB 700, CA. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (Reissue) PARA 141.

6 See *Re Montgomery Moore Ship Collision Doors Syndicate Ltd* (1903) 72 LJ Ch 624 (a case of equitable assignment).

7 *Re Steel Wing Co Ltd* [1921] 1 Ch 349.

8 *Re Globe Trust Ltd* [1916] WN 100.

9 *Re Cosh's Goods* (1909) 25 TLR 785.

10 *Goodman v Robinson* (1886) 18 QBD 332.

11 Cf *Goodman v Robinson* (1886) 18 QBD 332 at 335.

12 *East End Benefit Building Society v Slack* (1891) 60 LJQB 359, DC; and see CPR Sch 1 RSC Ord 46 rr 2, 4; CPR Sch 2 CCR Ord 26 r 5; and **CIVIL PROCEDURE** vol 12 (2009) PARAS 1274-1275, 1285.

13 le in accordance with the County Courts Act 1984 s 101: see **CIVIL PROCEDURE** vol 12 (2009) PARA 1631 et seq.

14 *Plant v Collins* [1913] 1 KB 242, CA.

15 *Shayler v Woolf* [1946] Ch 320, [1946] 2 All ER 54, CA; *Rumput (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines, The Leage* [1984] 2 Lloyd's Rep 259; *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nicolov* [1990] 2 Lloyd's Rep 11. See also **ARBITRATION** vol 2 (2008) PARA 1218.

16 *Bennett v White* [1910] 2 KB 643, CA.

17 *NW Robbie & Co Ltd v Witney Warehouse Co Ltd* [1963] 3 All ER 613, [1963] 1 WLR 1324, CA. Cf *Mathieson's Trustee v Burrup, Mathieson & Co* [1927] 1 Ch 562.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(iii) Notice and Effect of Assignment/83. Transfer subject to equities.

### **83. Transfer subject to equities.**

An assignment under the Law of Property Act 1925 is subject to all equities having priority over the right of the assignee<sup>1</sup>, such as equities arising by reason of the doctrine of constructive notice<sup>2</sup>. So far as priorities are concerned an assignee under the Act is in the same position as an equitable assignee<sup>3</sup>. In consequence, although the assignment may only transfer the benefit and not the burden of a contract, the assignee will take subject to any claim under the contract which would have been good against his assignor<sup>4</sup>. The debtor, however, cannot impeach the assignment on the ground of its being voluntary<sup>5</sup>.

The equities must be existing, or arising out of circumstances existing, before notice is given of the assignment<sup>6</sup>, and they must arise out of the subject matter of the assignment and must not constitute a personal or collateral claim against the assignor<sup>7</sup>.

1 Law of Property Act 1925 s 136(1). As to these equities see further PARA 60 et seq. An equitable interest which is earlier in point of time will not have priority unless the assignee had actual or constructive notice of it at the time of the assignment: *Ellerman Lines Ltd v Lancaster Maritime Co Ltd, The Lancaster* [1980] 2 Lloyd's Rep 497 at 503 per Robert Goff J.

2 See *Bateman v Hunt* [1904] 2 KB 530 at 538, CA. As to constructive notice see generally **EQUITY**.

3 *E Pfeiffer Weinkellerei-Weineinkauf GmbH & Co v Arbuthnot Factors Ltd* [1988] 1 WLR 150. As to the position of an equitable assignee see PARA 43. An assignment cannot be within the Law of Property Act 1925 unless notice has been given to the debtor: see PARA 80. See also *Compaq Computer Ltd v Abercorn Group Ltd (t/a Osiris)* [1993] BCLC 602, [1991] BCC 484.

4 *Torkington v Magee* [1902] 2 KB 427 at 432, DC (revsd on another point [1903] 1 KB 644, CA). As to an exclusive jurisdiction clause see *Glencore International AG v Metro Trading International Inc* [1999] 2 Lloyd's Rep 632, [1999] 2 All ER (Comm) 899; and PARA 60.

5 *Walker v Bradford Old Bank* (1884) 12 QBD 511.

6 *Re Pain, Gustavson v Haviland* [1919] 1 Ch 38. In the absence of notice of a prior charge, an assignment by way of security of the legal interest has priority: see *Khoury v Azar* [1953] 1 WLR 21 at 31. As to priorities and equities see PARAS 43 et seq, 60 et seq.

7 *Stoddart v Union Trust Ltd* [1912] 1 KB 181, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(iv) Protection of the Debtor or Person Liable/84. Right to interplead.

#### (iv) Protection of the Debtor or Person Liable

##### 84. Right to interplead.

Where the debtor, trustee or person liable in respect of the debt or the chose or thing in action has notice that the assignment is disputed by the assignor or any one claiming under him or of any other opposing or conflicting claims to the debt or thing in action, he may call upon the persons making claim to it to interplead concerning the same<sup>1</sup>. Interpleader will not be allowed where there has not been sufficient notice of an absolute written assignment<sup>2</sup>. The debtor interpleading will ordinarily be entitled to deduct his costs<sup>3</sup>. The county court has jurisdiction where the amount or value of the debt or thing in action does not exceed £30,000<sup>4</sup>.

Where the assignor has obtained judgment against the debtor in the county court and the goods of the debtor are taken in execution and sold, the district judge is not a 'trustee, or other person liable' in respect of the debt<sup>5</sup> so as to be entitled to call on the assignee, or other person claiming the proceeds of the sale in his hands, to interplead<sup>6</sup>.

1 Law of Property Act 1925 s 136(1); *Robinson v Jenkins* (1890) 24 QBD 275 at 279, CA, per Fry LJ. For a case of interpleader see *Buck v Robson* (1878) 3 QBD 686. As to interpleader see **CIVIL PROCEDURE** vol 12 (2009) PARA 1585 et seq.

2 *Re New Hamburg and Brazilian Rly Co* (1875) Bitt Prac Cas 57.

It has been held that if an action (now known as a claim) has been commenced against the debtor, the judge making an order in separate proceedings under the Law of Property Act 1925 cannot stay the proceedings in the action: *Reading v London School Board* (1886) 16 QBD 686, DC. However, except where otherwise provided, the court may now stay the whole or part of any proceedings either generally or until a specified date or event: see CPR 3.1(f); and **CIVIL PROCEDURE** vol 11 (2009) PARAS 247, 532.

3 *Re Bristow* [1906] 2 IR 215 at 219.

4 Law of Property Act 1925 s 136(3) (added by the County Courts Act 1984 Sch 2 Pt II para 4; and amended by SI 1991/724).

5 Ie within the meaning of the Law of Property Act 1925 s 136(1): see the text to note 1.

6 *Plant v Collins* [1913] 1 KB 242, CA (a decision concerning money in the hands of a high bailiff; the office of high bailiff has been abolished and the functions formerly performed by the high bailiff are now performed by the district judge: see **COURTS** vol 10 (Reissue) PARA 727).

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(5) ASSIGNMENTS UNDER THE LAW OF PROPERTY ACT 1925/(iv) Protection of the Debtor or Person Liable/85. Payment into court.

### **85. Payment into court.**

When the debtor or person liable in respect of a debt or other chose or thing in action, of which there has been an absolute assignment in writing complying with the statutory requirements<sup>1</sup>, has notice that the assignment is disputed by the assignor, or of other opposing or conflicting claims, he may, in accordance with the Trustee Act 1925<sup>2</sup>, pay the debt or thing in action into court<sup>3</sup>.

The county court has jurisdiction where the amount or value of the debt or thing in action does not exceed £30,000<sup>4</sup>.

1 This right of payment into court only applies to legal assignments to which the Law of Property Act 1925 s 136(1) applies: see *Re Sutton's Trusts* (1879) 12 ChD 175. As to the statutory requirements see PARA 72.

2 See the Trustee Act 1925 s 63 (amended by the Administration of Justice Act 1965 Sch 3); and **TRUSTS** vol 48 (2007 Reissue) PARA 917.

3 Law of Property Act 1925 s 136(1).

4 Law of Property Act 1925 s 136(3) (added by the County Courts Act 1984 Sch 2 Pt II para 4; and amended by SI 1991/724).



Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2.  
 ASSIGNMENT OF CHOSSES IN ACTION/(6) ASSIGNMENTS BY OPERATION OF LAW/86. Death.

## (6) ASSIGNMENTS BY OPERATION OF LAW

### 86. Death.

Upon the death of an individual, all choses or things in action to which he was entitled pass as a general rule to his personal representative<sup>1</sup>. If he dies intestate, all his property vests in the Public Trustee until an administrator is appointed<sup>2</sup>. There are, however, some exceptions<sup>3</sup>. For instance, the interest that the deceased person has in a chose in action jointly with another person does not pass to his personal representative, but to the other joint holder<sup>4</sup>, unless they are entitled as partners in trade, in which case the beneficial interest in the deceased person's share passes to his executor, but the right to recover it passes to the surviving partner<sup>5</sup>. Further, no contractual right or liability that is of a purely personal nature (that is, dependent on the skill or qualification of one party) can be assigned by operation of law<sup>6</sup>. Thus the personal representatives of a deceased may not sue or be sued on such a personal contract made by the deceased and the contract is discharged by the death<sup>7</sup>.

Any chose in action vested in a corporation sole, unless and until otherwise disposed of by the corporation sole, passes to the successors from time to time of that corporation<sup>8</sup>.

1 See **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 335 et seq. See also eg **INSURANCE** vol 25 (2003 Reissue) PARA 619 (transfer of fire insurance policy on death). As to the right to sue where the deceased has equitably assigned his right see PARA 68 note 6.

2 See the Administration of Estates Act 1925 s 9 (substituted by the Law of Property (Miscellaneous Provisions) Act 1994 s 14(1)); *Practice Direction* [1995] 3 All ER 192; and **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 34.

3 See generally **EXECUTORS AND ADMINISTRATORS**.

4 *Southcote v Hoare* (1810) 3 Taunt 87; cf the Administration of Estates Act 1925 s 3(4); and see **EXECUTORS AND ADMINISTRATORS** vol 17(2) (Reissue) PARA 353.

5 See **PARTNERSHIP** vol 79 (2008) PARA 122.

6 See PARA 100.

7 *Chamberlain v Williamson* (1814) 2 M & S 408; *Finlay v Chirney* (1888) 20 QBD 494, CA; *Phillips v Alhambra Palace Co* [1901] 1 KB 59 at 63, DC; *Farrow v Wilson* (1869) LR 4 CP 744; *Phillips v Jones* (1888) 4 TLR 401; *Campanari v Woodburn* (1854) 15 CB 400; *Friend v Young* [1897] 2 Ch 421; *Pool v Pool* (1889) 58 LJP 67; *Tasker v Shepherd* (1861) 6 H & N 575; *Graves v Cohen* (1929) 46 TLR 121. As to the principle that a personal contract is frustrated if the promisor becomes incapable of performing it see **CONTRACT** vol 9(1) (Reissue) PARA 903.

8 See the Law of Property Act 1925 s 180(1). Section 180(1) applies to property whether vested before or after 1 January 1926, the date of commencement of that Act: s 180(1). 'Property' includes any thing in action: s 205(1)(xx). As to the former law see *Howley v Knight* (1849) 14 QB 240; and see further **CORPORATIONS** vol 9(2) (2006 Reissue) PARA 1248.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(6) ASSIGNMENTS BY OPERATION OF LAW/87. Bankruptcy and insolvency.

## 87. Bankruptcy and insolvency.

Where a person is adjudged bankrupt his estate vests in the trustee of the bankrupt's estate immediately on his appointment taking effect or, in the case of the official receiver, on his becoming trustee<sup>1</sup>. Where any part of the estate consists of choses or things in action they are deemed to have been assigned to the trustee and vest in the trustee without any express assignment<sup>2</sup>; but notice of the deemed assignment need not be given except in so far as it is necessary, in a case where the deemed assignment is from the bankrupt himself, for protecting the priority of the trustee<sup>3</sup>.

A cause of action falls within the definition of property in the Insolvency Act 1986<sup>4</sup> and therefore constitutes part of a bankrupt's estate unless it consists solely of a cause of action personal to the bankrupt<sup>5</sup>. Thus where a cause of action for negligence gave rise to heads of damage for both loss of earnings and pain and suffering, the cause of action vested in the trustee. However, the right to recover the damages which were personal, and any damages recovered, were held by the trustee on a constructive trust for the bankrupt<sup>6</sup>.

A debt or other chose in action may be assigned by the trustee<sup>7</sup>.

Where there have been mutual dealings between the parties and one of them has been adjudged bankrupt, an account must be taken of what is due from each party to the other<sup>8</sup>. There must be a set-off and only the balance (if any) of the account is provable as a bankruptcy debt or, as the case may be, to be paid to the trustee as part of the bankrupt's estate<sup>9</sup>. Accordingly a debt owed to the bankrupt, or other chose in action, ceases to exist and is no longer available to be assigned by the trustee<sup>10</sup>, but the right to the net balance may be assigned like any other chose in action<sup>11</sup>.

1 Insolvency Act 1986 s 306(1). Cf *City of London Corp'n v Bown* (1989) 60 P & CR 42, 22 HLR 32, CA. See also eg **INSURANCE** vol 25 (2003 Reissue) PARA 619 (transfer of fire insurance policy on bankruptcy).

2 Insolvency Act 1986 ss 306(2), 311(4). See *Performing Right Society Ltd v Rowland* [1997] 3 All ER 336, [1998] BPIR 128.

3 Insolvency Act 1986 s 311(4).

4 See the Insolvency Act 1986 s 436; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 400. Note that in a company insolvency the power of sale conferred on a liquidator by Sch 4 para 6 is confined to the property of the company at the commencement of the liquidation and does not include the fruits of litigation brought by the liquidator under s 214 (see **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(3) (2004 Reissue) PARA 914): *Re Oasis Merchandising Services (in liquidation)*, *Ward v Aitken* [1998] Ch 170, [1997] 1 All ER 1009, CA; *Ruttle Plant Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 3)* [2008] EWHC 238 (TCC), [2009] 1 All ER 448, [2008] All ER (D) 270 (Jun).

5 *Rogers v Spence* (1846) 12 Cl & Fin 700; *Beckham v Drake* (1849) 2 HL Cas 579, HL; *Wilson v United Counties Bank Ltd* [1920] AC 102, HL; *Heath v Tang*, *Stevens v Peacock* [1993] 4 All ER 694, [1993] 1 WLR 1421, CA; *Ord v Upton (as trustee to the property of Ord)* [2000] Ch 352, [2000] 1 All ER 193, CA; *Cork (as trustee in bankruptcy for Rawlins) v Rawlins* [2001] EWCA Civ 202, [2001] Ch 792, [2001] 4 All ER 50.

6 *Ord v Upton (as trustee to the property of Ord)* [2000] Ch 352, [2000] 1 All ER 193, CA, distinguished in *Cork (as trustee in bankruptcy for Rawlins) v Rawlins* [2001] EWCA Civ 202, [2001] Ch 792, [2001] 4 All ER 50. Cf *Mulkerrins v PriceWaterhouseCoopers (a firm)* [2003] UKHL 41, [2003] 4 All ER 1, [2003] 1 WLR 1937. As to whether an assignment of a cause of action from the trustee to the bankrupt gives rise to a change in the bankrupt's capacity to bring or defend a claim see *Haq v Singh* [2001] EWCA Civ 957, [2001] 1 WLR 1594.

7 Insolvency Act 1986 ss 314, 436, Sch 5 Pt II para 9; *Seear v Lawson* (1880) 15 ChD 426, CA; *Guy v Churchill* (1888) 40 ChD 481; *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA. See, however, the cases cited in note 4.

8 Insolvency Act 1986 s 323(1), (2).

9 Insolvency Act 1986 s 323(2), (4).

10 *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL, overruling *Farley v Housing and Commercial Developments Ltd* [1984] BCLC 442, 1 BCC 99, 150 (dealing with the corresponding provisions which apply in the case of a company insolvency: see the Insolvency Rules 1986, SI 1986/1925, r 4.90 (substituted by SI 2005/527); and **COMPANY AND PARTNERSHIP INSOLVENCY** vol 7(4) (2004 Reissue) PARA 792). The Insolvency Rules 1986, SI 1986/1925, are modified in relation to insurers: see the Financial Services and Markets Act 2000 (Administration Orders relating to Insurers) Order 2002, SI 2002/1242; and **FINANCIAL SERVICES AND INSTITUTIONS** vol 48 (2008) PARA 492. See also **BANKRUPTCY AND INDIVIDUAL INSOLVENCY; INSURANCE**.

11 *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(6) ASSIGNMENTS BY OPERATION OF LAW/88. Other statutory transfers.

### **88. Other statutory transfers.**

A number of statutes make provision whereby property, including choses in action, is transferred by operation of law without the necessity for formal assignment. Such provision is, for example, made by the Industrial and Provident Societies Act 1965<sup>1</sup>; the Electricity Act 1989<sup>2</sup>; and the Access to Justice Act 1999<sup>3</sup>.

A statutory transfer may override a contractual prohibition on assignment without consent<sup>4</sup>.

1 See the Industrial and Provident Societies Act 1965 s 51(1); and **FINANCIAL SERVICES AND INSTITUTIONS** vol 50 (2008) PARA 2562. See also *Midlands Co-operative Society Ltd v Revenue and Customs Comrs* [2008] EWCA Civ 305, [2008] STC 1803 (a claim to repayment of VAT may form part of the statutory assignment of assets).

2 See the Electricity Act 1989 s 91; and **FUEL AND ENERGY** vol 19(2) (2007 Reissue) PARA 1034.

3 See the Access to Justice Act 1999 Sch 14 para 2(1); and **LEGAL AID** vol 65 (2008) PARA 3.

4 *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538, [2006] 1 WLR 1704, [2006] 2 BCLC 599.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(6) ASSIGNMENTS BY OPERATION OF LAW/89. Subrogation generally.

### **89. Subrogation generally.**

Subrogation is a restitutionary remedy which ensures the transfer of rights from one person to another by operation of law<sup>1</sup>. Subrogation is discussed in detail elsewhere in this work<sup>2</sup>.

1 As to subrogation see generally **EQUITY** vol 16(2) (Reissue) PARA 770 et seq. See also **FINANCIAL SERVICES AND INSTITUTIONS** vol 49 (2008) PARA 1138 (sureties); **INSURANCE** vol 25 (2003 Reissue) PARAS 195 et seq, 490 et seq, 677 et seq, 797.

2 See the titles cited in note 1.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSES IN ACTION/(6) ASSIGNMENTS BY OPERATION OF LAW/90. The Third Parties (Rights Against Insurers) Act 1930.

## **90. The Third Parties (Rights Against Insurers) Act 1930.**

Under the Third Parties (Rights Against Insurers) Act 1930<sup>1</sup>, where under any contract of insurance a person is insured against liabilities to third parties which he may incur, then, in the event of the insured becoming bankrupt or, being a company, in the event of a winding-up order being made, if any such liability is incurred by the insured, his rights against the insurer under the contract in respect of the liability are transferred to and vest in the third party to whom the liability was so incurred<sup>2</sup>.

The 1930 Act does not apply to contracts of reinsurance<sup>3</sup>.

1 See the Third Parties (Rights Against Insurers) Act 1930 s 1(1) (amended by the Insolvency Act 1985 Sch 8 para 7(2); the Insolvency Act 1986 Sch 14; and by SI 2003/2096); and **INSURANCE** vol 25 (2003 Reissue) PARA 679.

2 *Post Office v Norwich Union Fire Insurance Society Ltd* [1967] 2 QB 363, [1967] 1 All ER 577, CA; *Bradley v Eagle Star Insurance Co Ltd* [1989] AC 957, [1989] 1 All ER 961, HL; *Lefevre v White* [1990] 1 Lloyd's Rep 569; *MacMillan v AW Knott Becker Scott Ltd* [1990] 1 Lloyd's Rep 98; *Islander Trucking Ltd v Hogg Robinson & Gardner Mountain (Marine) Ltd* [1990] 1 All ER 826. As to the territorial scope of the Third Parties (Rights Against Insurers) Act 1930 see *Irish Shipping Ltd v Commercial Union Assurance Co plc*, *The Irish Rowan* [1991] 2 QB 206, [1989] 3 All ER 853, CA. For a full discussion see **INSURANCE** vol 25 (2003 Reissue) PARA 679 et seq.

3 See the Third Parties (Rights Against Insurers) Act 1930 s 1(5).

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/2. ASSIGNMENT OF CHOSSES IN ACTION/(6) ASSIGNMENTS BY OPERATION OF LAW/91. Court orders.

## **91. Court orders.**

Assignments of stock and things in action may be made by vesting orders of the court in the exercise of jurisdiction conferred by the Trustee Act 1925<sup>1</sup>. The court also has wide powers to transfer property, including choses in action, on divorce or the dissolution of a civil partnership, which are discussed elsewhere in this work<sup>2</sup>.

1 See the Trustee Act 1925 s 51 (amended by the Merchant Shipping Act 1995 Sch 13 para 13; and by SI 2004/1662); and **TRUSTS** vol 48 (2007 Reissue) PARA 884.

2 See the Matrimonial Causes Act 1973 Pt II (ss 21-40A); the Civil Partnership Act 2004 Pt 2 Ch 3 (ss 65-72); and **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 458 et seq.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(1) IN GENERAL/92. Reasons for restrictions.

### 3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT

#### (1) IN GENERAL

##### 92. Reasons for restrictions.

There are some choses or things in action<sup>1</sup> which have never been assignable; and, broadly speaking, it may be said that the reason for this is public policy<sup>2</sup>.

The assignment of a chose in action by or on behalf of an enemy is ineffective without Treasury consent<sup>3</sup>. Notice of abandonment to an underwriter of the interest of the insured in property and its acceptance by the underwriter constitutes such an assignment<sup>4</sup>.

A maritime lien is regarded as a personal privilege which enures to the sole benefit of the maritime lienor: it is not capable of being assigned<sup>5</sup>.

1 The pay and pensions of members of the armed forces are not in general recoverable by legal process (see eg *Mitchell v R* (1890) [1896] 1 QB 121n, CA; *Leaman v R* [1920] 3 KB 663; and **ARMED FORCES** vol 2(2) (Reissue) PARA 4) and are therefore not choses in action within the definition in PARA 1. The validity of such rights is, however, treated in this title for the sake of convenience: see PARAS 94-95. As to the treatment of such rights in bankruptcy see PARA 93. Note that a claim for rescission of a mortgage is a right of action but it is not a chose in action or part of a chose in action: such a claim can only be made by the owner of the mortgaged property and cannot be assigned separately from it: *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 All ER 98 at 118, [1998] 1 WLR 896 at 916, HL, per Lord Hoffman.

2 As to the avoidance of fraudulent and voluntary assignments see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 653 et seq.

3 See the Trading with the Enemy Act 1939 s 4(1); the Emergency Laws (Miscellaneous Provisions) Act 1953 Sch 2 para 9(1); and **WAR AND ARMED CONFLICT** vol 49(1) (2005 Reissue) PARA 583. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

4 *Allgemeine Versicherungs-Gesellschaft Helvetia v German Property Administrator* [1931] 1 KB 672, CA. In *Holland v German Property Administrator* [1937] 2 All ER 807, CA, however, it was held that the Treaty of Peace Order 1919, SR & O 1919/1517, did not, without a vesting order, effect an assignment of trust funds.

5 *The Sparti* [2000] 2 Lloyd's Rep 618, HK HC. As to maritime lien see **SHIPPING AND MARITIME LAW** vol 94 (2008) PARA 1014 et seq.



Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(1) IN GENERAL/93. Bankruptcy.

### 93. Bankruptcy.

Certain allowances, pensions and other statutory benefits are expressly declared by the statutes creating them to be inalienable and to be incapable of vesting in the trustee in bankruptcy or other representative of the creditors of the person to whom the payment is to be made<sup>1</sup>. It is uncertain whether the trustee may make an application for an income payments order<sup>2</sup> in respect of such payments. The order can in any event only be made in respect of income in excess of that which appears to the court to be necessary to meet the reasonable domestic needs of the bankrupt and his family<sup>3</sup>. Accordingly the question is unlikely to arise in respect of statutory allowances and benefits. It may, however, arise in respect of a pension, provided that the pension payment is held to be a 'payment in the nature of income'<sup>4</sup> and is not a payment by way of guaranteed minimum pension or a payment giving effect to the bankrupt's protected rights as a member of a pension scheme<sup>5</sup>. In some cases the statutory provision expressly preserves the powers of the court<sup>6</sup>.

<sup>1</sup> See PARA 96.

<sup>2</sup> See under the Insolvency Act 1986 s 310(1): see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 449.

<sup>3</sup> Insolvency Act 1986 s 310(2) (amended by the Pensions Act 1995 Sch 3 para 15). In making such an order the court acts on the principle of giving to the creditors the surplus after allowing to the bankrupt sufficient for his proper maintenance according to his condition of life. Cf *Re Graydon, ex p Official Receiver* [1896] 1 QB 417; *Mercer v Vans Colina* (1897) [1900] 1 QB 130n at 131.

<sup>4</sup> Insolvency Act 1986 s 310(7) (amended by the Pensions Act 1995 Sch 3 para 15; the Welfare Reform and Pensions Act 1999 Sch 2 para 2). See **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 449 et seq. The language of the Bankruptcy Act 1914 s 51(2) (repealed and replaced by the Insolvency Act 1986) was somewhat different. See *Re Garrett* [1930] 2 Ch 137; *Re Landau* [1934] Ch 549, CA; *Re Duckett (a bankrupt), ex p Minister of Education v The Trustee* [1964] Ch 398, CA, sub nom *Re Duckett (a bankrupt), ex p Minister of Education v McLeod* [1964] 1 All ER 19, CA. See also *Re Cox, ex p Corser* (1847) 11 Jur 212; *Re Payne, ex p Spooner* (1847) 11 Jur 963; *Spooner v Payne* (1852) 1 De GM & G 383; *Re Lupton, ex p Official Receiver* [1912] 1 KB 107, CA; *Hollinshead v Hazleton* [1916] 1 AC 428 at 441, HL, per Lord Atkinson.

<sup>5</sup> Insolvency Act 1986 s 310(8) (s 310(8), (9) added by the Pensions Act 1995 Sch 3 para 15(b)). For these purposes, 'guaranteed minimum pension' and 'protected rights' have the same meanings as in the Pension Schemes Act 1993 (see **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARAS 878, 883); Insolvency Act 1986 s 310(9) (as so added).

<sup>6</sup> See eg the Superannuation Act 1972 s 5(2) (amended by the Insolvency Act 1985 Sch 8 para 19(b); and the Insolvency Act 1986 Sch 14); and the Teachers' Pensions Regulations 1997, SI 1997/3001, reg E35(4). See also the Armed Forces Act 2006 s 365 (not fully in force); and PARA 96.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(2) PENSIONS, SALARIES AND MAINTENANCE/94. Pensions and salaries to public officers.

## **(2) PENSIONS, SALARIES AND MAINTENANCE**

### **94. Pensions and salaries to public officers.**

Public policy forbids that effect should be given to assignments of pensions and salaries of public officers payable to them for the purpose of maintaining the dignity of their office, or to assure a due discharge of its duties<sup>1</sup>. This rule has been held to apply not only to the salaries of the higher grades of the public service, but also to the wages of the lower grades, as, for example, those of a telephone attendant at a royal dockyard<sup>2</sup>. The office must be a public one, or in some way concerned with the public service<sup>3</sup>, and to make the office a public office the pay must come out of national, and not out of local, funds, and the office must be public in a very strict sense of that term. It is not enough that the due discharge of the duties of the office should be for the public benefit in a secondary and remote sense<sup>4</sup>; and, if the office is a sinecure, or the money is not payable during the lifetime of the officer, the pensions or annuities in respect of it are assignable<sup>5</sup>.

1 *Stone v Lidderdale* (1795) 2 Anst 533; *Aston v Gwinnell* (1829) 3 Y & J 136 at 148-149; *Grenfell v Dean and Canons of Windsor* (1840) 2 Beav 544 at 549; and see *Re Huggins, ex p Huggins* (1882) 21 ChD 85, CA.

2 *Mulvenna v Admiralty* 1926 SC 842, Ct of Sess.

3 *Grenfell v Dean and Canons of Windsor* (1840) 2 Beav 544.

4 *Re Mirams* [1891] 1 QB 594 (where the assignment of the salary of a workhouse chaplain payable out of the poor rate was held valid). A clergyman having the cure of souls is not a public officer, and there has been no decision against the assignment of his interest. At common law a beneficed clergyman can charge his benefice, and, since the repeal of 13 Eliz 1 c 20 (Benefices) (1571) by the Statute Law Revision Act 1948 Schedule (itself repealed), there is apparently no enactment prohibiting such an assignment; cf *Metcalfe v Archbishop of York* (1836) 1 My & Cr 547; and see **ECCLESIASTICAL LAW**.

5 *Arbuthnot v Norton* (1846) 5 Moo PCC 219, PC; *Grenfell v Dean and Canons of Windsor* (1840) 2 Beav 544. See, however PARA 95.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(2) PENSIONS, SALARIES AND MAINTENANCE/95. Salaries not assignable.

## 95. Salaries not assignable.

Public policy dictates that the salaries of the following public offices cannot be assigned: a judge<sup>1</sup>, an assistant parliamentary counsel to the Treasury<sup>2</sup>, and an officer in the army or navy<sup>3</sup>. Moreover as a general rule, the profits of a public office are not assignable<sup>4</sup>.

The alienation of a debt due to a medical practitioner from an insurance committee under former legislation relating to national health insurance has been held not to be against public policy<sup>5</sup>. Whether membership of the House of Commons is a public office, so as to render the salary paid to members inalienable, is doubtful<sup>6</sup>.

1 See *Arbuthnot v Norton* (1846) 5 Moo PCC 219 at 230-231, PC. As to the former office of clerk of the peace, abolished by the Courts Act 1971 s 44, see *Palmer v Bate* (1821) 2 Brod & Bing 673; *Hill v Paul* (1841) 8 Cl & Fin 295, HL.

2 *Cooper v Reilly* (1829) 2 Sim 560; further proceedings (1830) 1 Russ & M 560. As to the Treasury see **CONSTITUTIONAL LAW AND HUMAN RIGHTS** vol 8(2) (Reissue) PARA 512 et seq.

3 *Flarty v Odium* (1790) 3 Term Rep 681; *Lidderdale v Duke of Montrose* (1791) 4 Term Rep 248; *Barwick v Reade* (1791) 1 Hy Bl 627; *Stone v Lidderdale* (1795) 2 Anst 533; *McCarthy v Goold* (1810) 1 Ball & B 387; *Collyer v Fallon* (1823) Turn & R 459 at 474; *Apthorpe v Apthorpe* (1886) 12 PD 192, CA. Arrears of pay are assignable, since the right to them has become absolute: *Flarty v Odium* (1790) 3 Term Rep 681 at 683; *Price v Lovett* (1851) 20 LJ Ch 270; cf *Crowe v Price* (1889) 22 QBD 429, CA; and see also *Ellis v Earl Grey* (1833) 6 Sim 214; *Tunstall v Boothby* (1840) 10 Sim 542; *Grenfell v Dean and Canons of Windsor* (1840) 2 Beav 544. See also **ARMED FORCES**.

4 *Hill v Paul* (1841) 8 Cl & Fin 295 at 307, HL; *Palmer v Bate* (1821) 2 Brod & Bing 673; cf *Nichols v Davis* (1868) LR 4 CP 80. See, however, *Arbuthnot v Norton* (1846) 5 Moo PCC 219, PC. The profits of a college fellowship are assignable: *Feistel v King's College, Cambridge* (1847) 10 Beav 491; but see *Berkeley v King's College, Cambridge* (1830) 10 Beav 602.

5 *O'Driscoll v Manchester Insurance Committee* [1915] 1 KB 811; affd [1915] 3 KB 499, CA.

6 *Hollinshead v Hazleton* [1916] 1 AC 428, HL; cf per Lord Atkinson at 439 and per Lord Parker at 461.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(2) PENSIONS, SALARIES AND MAINTENANCE/96. Pensions, social security benefits, etc.

## 96. Pensions, social security benefits, etc.

Where a pension is granted by the Crown to one who, though not for the time engaged in any active duties, is still liable to be called to active service and is therefore to be considered in the service of the Crown, the pension is to be considered as to some extent granted in order to maintain the grantee until he is called on to serve again<sup>1</sup>. Thus compensation to a civil servant on reduction in an office, as he is liable to be called upon to serve again, is not assignable<sup>2</sup>; and a pension having for its object a perpetual memorial of national gratitude for public services is not alienable<sup>3</sup>.

A person may assign a pension given to him entirely for past services, whether granted to him for life or during pleasure<sup>4</sup>, except where assignment is forbidden by statute, as is so in the case of naval, military and air force pensions<sup>5</sup>; benefits under civil service superannuation schemes<sup>6</sup>; parliamentary pensions<sup>7</sup>; pensions of retired clergy<sup>8</sup>; police pensions<sup>9</sup>; firemen's pensions<sup>10</sup>; superannuation benefits payable out of funds maintained by local authorities<sup>11</sup>; pensions of persons engaged in the National Health Service<sup>12</sup>; superannuation benefits payable to school teachers<sup>13</sup>; and certain judicial pensions<sup>14</sup>. There are restrictions on the assignment of the wages of seamen<sup>15</sup>. Social security benefits<sup>16</sup> are not assignable<sup>17</sup>, nor is the guaranteed minimum pension under an occupational pension scheme<sup>18</sup>.

1 *Wells v Foster* (1841) 8 M & W 149 at 152.

2 *Wells v Foster* (1841) 8 M & W 149. Cf the half-pay cases of *Flarty v Odlum* (1790) 3 Term Rep 681; *Lidderdale v Duke of Montrose* (1791) 4 Term Rep 248; *McCarthy v Gould* (1810) 1 Ball & B 387. As to pensions granted to former members of the Indian civil service see *Knill v Dumergue* [1911] 2 Ch 199, CA.

3 *Davis v Duke of Marlborough* (1818) 1 Swan 74.

4 *Wells v Foster* (1841) 8 M & W 149 at 152 per Parke B, approved in *Willcock v Terrell* (1878) 3 Ex D 323, CA (pension of former county court judge); *McCarthy v Gould* (1810) 1 Ball & B 387, distinguishing *Stone v Lidderdale* (1795) 2 Anst 533. See also *Arbuthnot v Norton* (1846) 5 Moo PCC 219 (sum payable to executors of a judge); *Dent v Dent* (1867) LR 1 P & D 366 (Indian navy officer's pension); *Sansom v Sansom* (1879) 4 PD 69 (civil service pension); *Re Huggins, ex p Huggins* (1882) 21 ChD 85, CA (pension of retired colonial judge); *McBean v Deane* (1885) 30 ChD 520 (where an annuity to a retiring incumbent under the Union of Benefices Act 1860 (repealed) was held assignable); and contrast *Gathercole v Smith* (1881) 17 ChD 1, CA; *Gathercole v Smith* (1881) 7 QBD 626, CA (where the annuity was payable to the retiring incumbent under the Incumbents Resignation Act 1871 s 10 (repealed)); cf the text and note 8.

5 See the Naval Discipline Act 1957 s 128G(1), (2) (added by the Armed Forces Act 1991 s 16); the Army Act 1955 s 203(1), (2); and the Air Force Act 1955 s 203(1), (2) (all prospectively repealed by the Armed Forces Act 2006 Sch 17, with effect from 31 October 2009); and the Armed Forces Act 2006 s 356 (fully in force with effect from 31 October 2009 (see the Armed Forces Act 2006 (Commencement No 5) Order 2009, SI 2009/1167, art 4)). See also *Birch v Birch* (1883) 8 PD 163; *Lucas v Harris* (1886) 18 QBD 127, CA; *Crowe v Price* (1889) 22 QBD 429, CA; *Jones & Co v Coventry* [1909] 2 KB 1029, DC; *Walker v Walker* (1982) 4 FLR 455; *Roberts v Roberts* [1986] 2 All ER 483, [1986] 1 WLR 437; *Ranson v Ranson* [1988] 1 WLR 183, CA, distinguished in *Happé v Happé* [1991] 4 All ER 527, [1990] 1 WLR 1282, CA; *Cotgrave v Cotgrave* [1992] Fam 33, [1991] 4 All ER 537, CA; *Legrove v Legrove* [1995] 1 FCR 102, [1994] 2 FLR 119, CA. See also *Bank Mellat v Kazmi* [1989] QB 541, [1989] 1 All ER 925, CA. See further **ARMED FORCES**.

Nothing in the statutory provisions cited in this note applies, however, to a court exercising its powers under the Matrimonial Causes Act 1973 s 23 (or, from a day to be appointed, under s 22A or s 23) in respect of any benefits under a pension scheme which a party to a marriage has or is likely to have: see the Pensions Act 1995 s 166(4), (5) (amended by the Welfare Reform and Pensions Act 1999 Sch 12 Pt I paras 43, 62(1)-(3); and by SI 2005/3029; prospectively amended by the Armed Forces Act 2006 Sch 16 para 132, with effect from 31 October 2009); the Welfare Reform and Pensions Act 1999 s 44 (prospectively amended by the Armed Forces Act 2006

Sch 16 para 162, with effect from that date); and **SOCIAL SECURITY AND PENSIONS**. Nor does anything in those provisions apply to a court exercising its powers under the Civil Partnership Act 2004 Sch 5 Pt 4 (pension sharing orders on or after dissolution or nullity order) or Sch 5 Pt 6 (making of Part 1 orders having regard to pension benefits): see the Pensions Act 1995 s 166(4A), (5) (s 166(4A) added by SI 2005/3029); the Welfare Reform and Pensions Act 1999 s 44 (as so amended). As to payments to a trustee in bankruptcy under the Insolvency Act 1986 s 310 see PARA 93 note 5.

6 Superannuation Act 1972 s 5(1). Section 5(2) expressly provides that nothing in s 5(1) is to affect the powers of any court under the Insolvency Act 1986 s 310, under which a bankrupt's salary, pension etc, may be ordered to be paid to the trustee in bankruptcy: see PARA 93 note 5.

7 See the Parliamentary and other Pensions Act 1987 Sch 1 para 9; and the Parliamentary Pensions (Consolidation and Amendment) Regulations 1993, SI 1993/3253, reg R1(1) (amended by SI 2001/2649), which provides that a pension under the regulations or under the previous statutory provisions (ie under the Parliamentary and other Pensions Act 1972 Pt I (ss 1-25) (repealed) or the Ministerial Salaries and Members' Pensions Act 1965 Pt II (repealed)) is not assignable or chargeable with debts or other liabilities except to the extent permitted by the Welfare Reform and Pensions Act 1999 s 44. See further **PARLIAMENT** vol 78 (2010) PARAS 926-927.

8 Church of England Pensions Regulations 1988, SI 1988/2256, reg 29(2); and see *Gathercole v Smith* (1881) 17 ChD 1, CA; *Gathercole v Smith* (1881) 7 QBD 626, CA.

9 See the Police Pensions Act 1976 ss 9, 11; and **POLICE** vol 36(1) (2007 Reissue) PARA 407 et seq.

10 See the Firefighters' Pension Scheme (England) Order 2006, SI 2006/3432, Sch 1 Pt 14 r 6(2); the Firefighters' Pension Scheme (Wales) Order 2007, SI 2007/1072, Sch 1 Pt 14 r 6(2); and **FIRE SERVICES** vol 18(2) (Reissue) PARA 45 et seq.

11 Superannuation Act 1972 Sch 7 para 5 (preserving the effect of the Local Government Superannuation Act 1937 s 23 and the Local Government Superannuation Act 1953 s 26 (both repealed)).

12 National Health Service Pension Scheme Regulations 1995, SI 1995/300, reg T3(1), (2). Where, following the bankruptcy of any person entitled to a benefit under the scheme, the court makes an income payments order under the Insolvency Act 1986 s 310 (see PARA 93) that requires the Secretary of State to pay all or part of the benefit to the person's trustee in bankruptcy the Secretary of State must, however, comply with that order: reg T3(3).

13 Teachers' Pensions Regulations 1997, SI 1997/3001, reg E35(1). Regulation 3(1) does not, however, preclude any payment of benefit pursuant to an order of the court under the Matrimonial Causes Act 1973 s 25B or s 25C or pursuant to regulations under s 25D or pursuant to pension sharing under the Welfare Reform and Pensions Act 1999 Pt IV Ch I (ss 27-46) or corresponding Northern Ireland legislation (Teachers' Pensions Regulations 1997, SI 1997/3001, reg E35(3) (amended by SI 2000/3028)); and on the bankruptcy of a person entitled to a benefit under the Teachers' Pensions Regulations 1997, SI 1997/3001, Pt E (regs E1-E35) no part of the benefit passes to any trustee or other person acting on behalf of the creditors except in accordance with an income payments order made by a court under the Insolvency Act 1986 s 310 (see PARA 93; and **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 449 et seq) (Teachers' Pensions Regulations 1997, SI 1997/3001, reg E35(4)). See further **EDUCATION** vol 15(2) (2006 Reissue) PARA 867 et seq.

14 See the Judicial Pensions (Preservation of Benefits) Order 1995, SI 1995/634, art 7 (amended by SI 2005/3325; revoked in relation to Northern Ireland by SI 1995/2647); and **COURTS** vol 10 (Reissue) PARA 543.

15 See the Merchant Shipping Act 1995 s 34; and **SHIPPING AND MARITIME LAW** vol 93 (2008) PARA 471.

16 Ie: (1) benefit as defined in the Social Security Contributions and Benefits Act 1992 s 122; (2) a jobseeker's allowance; (3) state pension credit; (4) an employment and support allowance; (5) any income-related benefit; and (6) child benefit: Social Security Administration Act 1992 s 187(1) (amended by the Jobseekers Act 1995 Sch 2 para 72; the State Pension Credit Act Sch 2 Pt 2 paras 8, 23; the Welfare Reform Act 2007 Sch 3, para 10(1), (31)). See further **SOCIAL SECURITY AND PENSIONS**.

17 Social Security Administration Act 1992 s 187(1) (as amended: see note 16). On the bankruptcy of the recipient of a benefit the benefit will not pass to any trustee or other person acting on behalf of his creditors: s 187(1) (as so amended). Cf *Bank Mellat v Kazmi* [1989] QB 541, [1989] 1 All ER 925, CA (a decision on the Supplementary Benefits Act 1976 s 16(1) (repealed)).

18 See the Pension Schemes Act 1993 s 159; and **SOCIAL SECURITY AND PENSIONS** vol 44(2) (Reissue) PARA 928.

## UPDATE

**96 Pensions, social security benefits, etc**

NOTE 12--SI 1995/300 reg T3 amended: SI 2009/2446.

Halsbury's Laws of England/CHOSSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(2) PENSIONS, SALARIES AND MAINTENANCE/97. Maintenance.

## 97. Maintenance.

Maintenance pending suit granted to a spouse or civil partner is not assignable<sup>1</sup>. It is not in the nature of property, but only money paid by the order of the court from time to time to provide for maintenance<sup>2</sup>. Unsecured periodical payments by way of maintenance ordered on or after the granting of a divorce or the dissolution of a civil partnership<sup>3</sup> are not alienable<sup>4</sup>, but a life annuity secured to a divorced wife has been held to be assignable<sup>5</sup>. Likewise a wife's rights under an order for a lump sum payment have been held to be assignable<sup>6</sup>.

1 *Re Robinson* (1884) 27 ChD 160, CA; *Taylor (formerly Kraupl) v National Assistance Board* [1956] P 470, [1956] 2 All ER 455 (on appeal on other points [1957] P 101, [1957] 1 All ER 183, CA; affd [1958] AC 532, [1957] 3 All ER 703, HL). See also *Vandergucht v De Blaquiére* (1839) 5 My & Cr 229; *Campbell v Campbell* [1922] P 187 at 192.

2 As to maintenance pending suit see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 456.

3 As to financial relief on divorce etc see **MATRIMONIAL AND CIVIL PARTNERSHIP LAW** vol 72 (2009) PARA 458 et seq.

4 *Taylor (formerly Kraupl) v National Assistance Board* [1956] P 470 at 496-498, [1956] 2 All ER 455 at 460-461, 466 (on appeal on other points [1957] P 101, [1957] 1 All ER 183, CA; affd [1958] AC 532, [1957] 3 All ER 703, HL); *Re Robinson* (1884) 27 ChD 160, CA; *Watkins v Watkins* [1896] P 222, CA; *Campbell v Campbell* [1922] P 187 at 192; *Smith v Smith* [1923] P 191 at 204, CA, per Scrutton LJ; *Paquine v Snary* [1909] 1 KB 688, CA.

5 *Harrison v Harrison* (1888) 13 PD 180, CA.

6 See *Sears Tooth (a firm) v Payne Hicks Beach (a firm)* [1998] 1 FCR 231, [1997] 2 FLR 116 (wife's rights assignable because the order could not be discharged or varied under the Matrimonial Causes Act 1973 s 31). However, an order for the payment of a lump sum in a case in which the payment is to be by instalments may be so discharged or varied: see s 31(1)(d) (both as originally enacted and as prospectively substituted with savings by the Family Law Act 1996 Sch 8 para 16(2)(b), Sch 9 para 5). Quaere whether the wife's rights under such an order are assignable.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(3) RIGHT OF ACTION/98. Bare right of action.

### (3) RIGHT OF ACTION

#### 98. Bare right of action.

A bare right of litigation, such as a claim for damages for defamation or personal injury, is not assignable<sup>1</sup>, on the principle that the law will not recognise any transaction savouring of maintenance or champerty<sup>2</sup>. What is contrary to public policy and ineffective is an agreement which has maintenance or champerty as its object; such a consequence will not be avoided by dressing up a transaction which has that character and intent as an assignment of a debt<sup>3</sup>. However, the fruits of an action may be assigned<sup>4</sup>.

Assignments of the following kinds have accordingly been declared to be void, namely, an assignment of the mere right to sue a trustee on the chance of recovering from him some interest or profits in respect of part of the trust funds formerly in his hands<sup>5</sup>; an assignment of a licence to take possession of goods<sup>6</sup>; an assignment of a right to set aside a deed on the ground of fraud<sup>7</sup>; an assignment of a debt due from a company, coupled with the right to proceed with a winding-up petition against the company already filed by the assignor with the view of obtaining payment of the debt<sup>8</sup>; and the assignment of a claim as a step to its being sold on to a third party with no genuine commercial interest in the claim in return for a division of the spoils<sup>9</sup>. Under the special provisions of the law of insolvency<sup>10</sup> both a trustee in bankruptcy and a liquidator are given statutory power to sell a cause of action, and this may be on terms that the assignee by way of consideration will pay over a share of the recoveries<sup>11</sup>. A trustee in bankruptcy may even sell to the bankrupt himself<sup>12</sup>. The statutory power necessarily precludes any challenge on grounds of maintenance or champerty<sup>13</sup>. A distinction has been drawn between a sale of a bare cause of action and a sale of the recoveries. The latter, in the absence of any agreement by the purchaser to finance the litigation, has long been regarded as valid and unobjectionable on grounds of maintenance<sup>14</sup>. It has been held that it may be a different matter if the sale includes provision for the purchaser to finance the litigation: the case is then said to fall within the law of maintenance and champerty, and the statutory exemption does not apply<sup>15</sup>; but this view has been doubted<sup>16</sup>.

1 *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260 at 271, CA, per Stirling LJ, approving *Prosser v Edmonds* (1835) 1 Y & C Ex 481 at 496-499 (but see the comment of Scrutton LJ in *Ellis v Torrington* [1920] 1 KB 399 at 413, CA); *Fitzroy v Cave* [1905] 2 KB 364 at 371, CA, per Cozens-Hardy LJ; *Hill v Boyle* (1867) LR 4 Eq 260; *Defries v Milne* [1913] 1 Ch 98, CA; *Holt v Heatherfield Trust Ltd* [1942] 2 KB 1 at 9, [1942] 1 All ER 404 at 410; *Laurent v Sale & Co* [1963] 2 All ER 63, [1963] 1 WLR 829. See also *Powell v Knowler* (1741) 2 Atk 224; *Kenney v Browne* (1796) 3 Ridg Parl Rep 462 at 498, 501; *Bayley v Tyrrell* (1813) 2 Ball & B 358; *Stanley v Jones* (1831) 7 Bing 369; *Sprye v Porter* (1856) 7 E & B 58; *Twiss v Noble* (1869) 4 IR Eq 64; *Keogh v M'Grath* (1879) 5 LR Ir 478. The earlier cases must now be read in the light of the decision in *Trendtex Trading Corp v Crédit Suisse* [1980] QB 629, [1980] 3 All ER 721, CA; affd [1982] AC 679, [1981] 3 All ER 520, HL, where Lord Roskill said, at 703 and 531: 'The old saying that you cannot assign 'a bare right to litigate' ... still remains a fundamental principle of our law'. See also *Brownston Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, CA.

2 The rule is unaffected by the Criminal Law Act 1967, which abolished the offences of maintenance and champerty (s 13) and provided that no person should be liable in tort for any conduct on account of its being maintenance or champerty (s 14(1)). It was expressly provided by s 14(2) that the abolition of criminal and civil liability should not affect any rule of law as to the cases in which a contract is to be treated as contrary to public policy or otherwise illegal. See *Trendtex Trading Corp v Crédit Suisse* [1980] QB 629, [1980] 3 All ER 721, CA (affd [1982] AC 679, [1981] 3 All ER 520, HL); *Re Distributors and Warehousing Ltd* [1986] BCLC 129, 1 BCC 99, 570.

3 *Giles v Thompson* [1994] 1 AC 142, [1993] 3 All ER 321, HL (and see especially at 153 and 351 per Lord Mustill); *Camdex International Ltd v Bank of Zambia* [1998] QB 22, [1996] 3 All ER 431, CA. See also *R (on the*



*application of Factortame) v Secretary of State for the Environment, Transport and the Regions (No 8)*[2002] EWCA Civ 932, [2003] QB 381, [2002] 4 All ER 97.

4 *Glegg v Bromley*[1912] 3 KB 474, CA; *Sears Tooth (a firm) v Payne Hicks Beach (a firm)*[1998] 1 FCR 231, [1997] 2 FLR 116.

5 *Hill v Boyle* (1867) LR 4 Eq 260.

6 *Re Davis & Co, ex p Rawlings* (1888) 22 QBD 193, CA, following *Brown v Metropolitan Counties and General Life Assurance, Annuity, Loan, and Investment Society* (1859) 1 E & E 832.

7 *Prosser v Edmonds* (1835) 1 Y & C Ex 481 (but see the comment of Scrutton LJ in *Ellis v Torrington* [1920] 1 KB 399 at 413, CA); *Fitzroy v Cave* [1905] 2 KB 364, CA. See also *De Hoghton v Money* (1866) 2 Ch App 164, CA.

8 *Re Paris Skating Rink Co* (1877) 5 ChD 959, CA.

9 *Trendtex Trading Corp v Crédit Suisse* [1980] QB 629, [1980] 3 All ER 721, CA (affd [1982] AC 679, [1981] 3 All ER 520, HL); *Laurent v Sale & Co* [1963] 2 All ER 63, [1963] 1 WLR 829.

10 In the Insolvency Act 1986 ss 165, 166, 314, Sch 4 para 6, Sch 5 para 9: see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARAS 458, 460; **COMPANY AND PARTNERSHIP INSOLVENCY**.

11 *Seear v Lawson* (1880) 15 ChD 426, CA; *Guy v Churchill* (1888) 40 ChD 481; *Ogdens Ltd v Weinberg* (1906) 95 LT 567, HL. Similarly in the case of the liquidation of a company: *Freightex Ltd v International Express Co Ltd* (15 April 1980, unreported), CA; *Groewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, [1994] 4 All ER 417 (not followed in *Farmer v Moseley (Holdings) Ltd* [2001] 2 BCLC 572); *Re Oakleague Ltd*[1995] 2 BCLC 624, [1995] BCC 921. However, a liquidator's power to prosecute and carry on proceedings, which arises only after liquidation, is not 'property of the company' and cannot be sold under the statutory powers: *Ruttle Plant Ltd v Secretary of State for the Environment, Food and Rural Affairs (No 3)*[2008] EWHC 238 (TCC), [2009] 1 All ER 448, [2008] All ER (D) 270 (Jun). The decisions in these cases turn on the provisions of the bankruptcy and insolvency legislation: see note 10.

12 *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA; *Groewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, [1994] 4 All ER 417 (not followed in *Farmer v Moseley (Holdings) Ltd* [2001] 2 BCLC 572).

13 *Ramsey v Hartley* [1977] 2 All ER 673, [1977] 1 WLR 686, CA; *Groewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, [1994] 4 All ER 417 (not followed in *Farmer v Moseley (Holdings) Ltd* [2001] 2 BCLC 572).

14 See *Glegg v Bromley*[1912] 3 KB 474, CA.

15 *Groewood Holdings plc v James Capel & Co Ltd* [1995] Ch 80, [1994] 4 All ER 417 (not followed in *Farmer v Moseley (Holdings) Ltd* [2001] 2 BCLC 572).

16 *Re Oasis Merchandising Services Ltd*[1995] 2 BCLC 493, [1995] BCC 911 (affd sub nom *Re Oasis Merchandising Services Ltd, Ward v Aitkin*[1998] Ch 170, [1997] 1 All ER 1009, CA); *Farmer v Moseley (Holdings) Ltd*[2001] 2 BCLC 572; and see *ANC Ltd v Clark Goldring & Page Ltd*[2001] BPIR 568, CA.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(3) RIGHT OF ACTION/99. Cases where right of action is incident to a right in property or where assignee has a genuine commercial interest in taking the assignment.

**99. Cases where right of action is incident to a right in property or where assignee has a genuine commercial interest in taking the assignment.**

The law has become more liberal in its approach to the circumstances in which it would recognise the validity of an assignment of a cause of action and not strike it down as being one of a bare cause of action<sup>1</sup>. It has long been recognised that where the assignee has by the assignment acquired a property right and the cause of action was incidental to that right, the assignment may be effective<sup>2</sup>, but it is not always necessary for the assignee to show a property right to support his assignment. It will suffice if the assignee has a genuine commercial interest in taking the assignment and in enforcing it for his own benefit<sup>3</sup>. Thus it has been held that there may be a valid assignment (for example by mortgage) of property, being the fruits of litigation<sup>4</sup>. Again, the purchaser of a freehold reversion may take an assignment of the right to recover damages for dilapidations from a sub-tenant<sup>5</sup>. A creditor may assign his debt, whether or not disputed by the debtor<sup>6</sup>, so as to enable another to sue for it, though the wish of that other person to enforce the debt arises from ill-feeling towards the debtor<sup>7</sup>. It has been held that a person may buy shares in a company merely for the purpose of challenging, by legal proceedings, acts of the directors as ultra vires<sup>8</sup>. An assignment by an assured to his insurer of his rights against a contract breaker or tortfeasor is good, the enforcement of the cause of action being legitimately supported by the insurer's interest in recouping himself in respect of the amount of the loss which he has paid under the policy as a result of the acts, neglect or defaults of the actual contract breaker or tortfeasor<sup>9</sup>.

It must be remembered in this connection that solicitors purchasing from their clients the subject matter of a suit are in a different position from other purchasers<sup>10</sup>. After his employment as such in the suit<sup>11</sup> a solicitor cannot purchase the subject matter of it from his client<sup>12</sup>, although he may lawfully take a mortgage upon it to secure costs and expenses already incurred<sup>13</sup>.

The assignment of a right of action by a party not entitled to legal aid to a party so entitled, where the object and effect of the assignment is to enable the assignee to obtain legal aid which is not available to the assignor and the assignor continues to be substantially interested in the fruits of the assigned rights of action, is not contrary to public policy or unlawful<sup>14</sup>.

1 *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL; *Brownnton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, CA; *P Furey & Co Ltd v Johnson Construction Ltd* (19 February 1987, unreported).

2 2 Roll Abr 113; YB 21 Edw 3 fo 10 pl 33; *Dickinson v Burrell* (1866) LR 1 Eq 337; *County Hotel and Wine Co Ltd v London and North Western Ry Co* [1918] 2 KB 251 (on appeal [1919] 2 KB 29, CA; affd on other grounds [1921] 1 AC 85, HL); *Ellis v Torrington* [1920] 1 KB 399, CA; *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL.

3 *Trendtex Trading Corp v Crédit Suisse* [1982] AC 679, [1981] 3 All ER 520, HL (where, however, the assignment was void for champerty as a step to the sale of a bare cause of action to a third party with no genuine commercial interest in the claim); applied in *24 Seven Utility Services Ltd v Rosekey Ltd (t/a Atwal Builders)* [2003] EWHC 3415 (QB), [2004] All ER (D) 288 (Feb) (cause of action in tort capable of assignment); and see *Jewson v Batey* [2008] EWCA Civ 18, [2008] All ER (D) 226 (Jan); *Offer-Hoar v Larkstore Ltd (Technotrade Ltd Pt 20 defendant)* [2006] EWCA Civ 1079, [2007] 1 All ER (Comm) 104, [2006] 1 WLR 2926; *Massai Aviation Services Ltd v A-G* [2007] UKPC 12, [2007] 5 LRC 179; *Bourne v Colodense Ltd* [1985] ICR 291, CA; *Brownnton Ltd v Edward Moore Inbucon Ltd* [1985] 3 All ER 499, CA; *South East Thames Regional Health Authority v YJ Lovell (London) Ltd* (1985) 9 ConLR 36; *Cromlech Property Co Ltd v Costain Construction Co Ltd*

(1986) 10 ConLR 110; *Dickinson v Burrell* (1866) LR 1 Eq 337; *Prosser v Edmonds* (1835) 1 Y & C Ex 481; *Harrington v Long* (1833) 2 My & K 590; *Knight v Bowyer* (1858) 2 De G & J 421.

4 *Glegg v Bromley* [1912] 3 KB 474 at 484, CA, per Vaughan Williams LJ, and at 490 per Parker J (the mortgage conferred no right on the mortgagee to interfere in the conduct of the proceedings).

5 *Williams v Protheroe* (1829) 5 Bing 309; *Ellis v Torrington* [1920] 1 KB 399, CA.

6 *Camdex International Ltd v Bank of Zambia* [1998] QB 22, [1996] 3 All ER 431, CA.

7 *Fitzroy v Cave* [1905] 2 KB 364, CA.

8 *Bloxam v Metropolitan Rly Co* (1868) 3 Ch App 337 at 353. In favour of a person dealing with a company in good faith, the power of the board of directors to bind the company, or authorise others to do so, is now deemed to be free of any limitation under the company's constitution (see the Companies Act 1985 s 35A (repealed with effect from 1 October 2009 by the Companies Act 2006 Sch 16 and replaced by the Companies Act 2006 s 40), abolishing the doctrine of ultra vires as it formerly affected the company and directors as regards a person dealing with the company in good faith; and see **COMPANIES** vol 14 (2009) PARA 263); nevertheless, as regards the directors and the company any acts done by either which are beyond the constitution will be ultra vires and therefore invalid (see **COMPANIES** vol 14 (2009) PARA 263).

9 *Cia Columbiana de Seguros v Pacific Steam Navigation Co* [1965] 1 QB 101, [1964] 1 All ER 216.

10 See *Trendtex Trading Corp v Crédit Suisse* [1980] QB 629 at 663, [1980] 3 All ER 721 at 748, CA, per Oliver LJ; affd [1982] AC 679, [1981] 3 All ER 520, HL.

11 *Knight v Bowyer* (1858) 2 De G & J 421, CA; *Davis v Freethy* (1890) 24 QBD 519, CA.

12 *Wood v Downes* (1811) 18 Ves 120; *Simpson v Lamb* (1857) 7 E & B 84; *Davis v Freethy* (1890) 24 QBD 519, CA. See also the Solicitors Act 1974 s 59(2); and **LEGAL PROFESSIONS** vol 66 (2009) PARA 945.

13 *Anderson v Radcliffe and Walker* (1858) EB & E 806. See further **LEGAL PROFESSIONS** vol 66 (2009) PARAS 808, 987.

14 *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd, Circuit Systems Ltd (in liquidation) v Zuken-Redac (UK) Ltd* [1999] 2 AC 1, [1998] 1 All ER 218, HL, overruling *Advanced Technology Structures Ltd v Cray Valley Products Ltd, Pratt v Cray Valley Products Ltd* [1993] BCLC 723, CA, and affg *Circuit Systems Ltd (in liquidation) v Zuken-Redac (UK) Ltd* [1996] 3 All ER 748, [1997] 1 WLR 721, CA, and *Norglen Ltd (in liquidation) v Reeds Rains Prudential Ltd* [1996] 1 All ER 945, [1996] 1 WLR 864, CA. See also *Eurocross Sales Ltd v Cornhill Insurance plc* [1995] 4 All ER 950, [1995] 1 WLR 1517, CA; *Stein v Blake* [1996] AC 243, [1995] 2 All ER 961, HL. As to the replacement of civil legal aid with funding by the Community Legal Service Fund see generally **LEGAL AID** vol 65 (2008) PARAS 2, 37 et seq.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(4) PARTICULAR CONTRACTS/100. Personal contracts and covenants.

## (4) PARTICULAR CONTRACTS

### 100. Personal contracts and covenants.

Where a contract involves personal skill or confidence, such as a contract between an author and publisher that the one shall write and the other publish a book<sup>1</sup>, it is not assignable<sup>2</sup>, and this principle extends to cases where the ability of one party to a contract to conduct his business and make it pay and so to be able to pay the other party is the subject matter of personal confidence<sup>3</sup>. The same rule applies where the effect of the assignment of rights under a contract would be to increase the burden on the other party<sup>4</sup>. The benefit of a covenant entered into for the personal advantage of an individual, not for the protection of property, is not assignable<sup>5</sup>. Policies of fire insurance are considered to be personal contracts and ordinarily are not assignable without the consent of the insurer<sup>6</sup>. Similarly, a motor insurance policy cannot be assigned<sup>7</sup>; nor can rights under a continuing contract for medical services<sup>8</sup>. It has, however, been held that where the client seeks to preserve and rely upon the trust and confidence he has in a particular solicitor, a conditional fee agreement may be assigned when that solicitor moves to a new firm<sup>9</sup>.

On a transfer of the property, rights and liabilities of one company to another company by order of the court under the statutory provisions for facilitating reconstruction and amalgamation, a contract of service between an employee and the transferor company does not automatically become a contract of service between the employee and the transferee company<sup>10</sup> unless the transfer is a relevant transfer for the purposes of the Transfer of Undertakings (Protection of Employment) Regulations 2006<sup>11</sup>.

1 *Stevens v Benning* (1855) 6 De GM & G 233; *Reade v Bentley* (1858) 4 K & J 656; *Hole v Bradbury* (1879) 12 ChD 886; *Griffith v Tower Publishing Co Ltd and Moncrieff* [1897] 1 Ch 21.

2 *Robson v Drummond* (1831) 2 B & Ad 303 (hire of carriage; cf *British Waggon Co v Lea & Co* (1880) 5 QBD 149, DC (hire of railway wagons)); *Jaeger's Sanitary Woollen System Co Ltd v Walker & Sons* (1897) 77 LT 180, CA (manufacturing agreement requiring skill and supervision); *International Fibre Syndicate v Dawson* (1901) 84 LT 803, HL (agreement for supply and erection of patented machine); *Berlitz School of Languages Ltd v Duchêne* (1903) 6 F 181; *Kemp v Baerselman* [1906] 2 KB 604, CA (contract to supply goods, the purchaser undertaking not to purchase from any other merchant); *Harvey v Tivoli, Manchester Ltd* (1907) 23 TLR 592, DC (engagement of troupe for performance at a music hall; cf *Phillips v Alhambra Palace Co* [1901] 1 KB 59, DC (death of member of firm carrying on business of music hall proprietors held not to put an end to contract with troupe of performers)); *James v Morgan* [1909] 1 KB 564, DC (agreement to pay mother for maintenance of child); *Cooper v Micklefield Coal and Lime Co Ltd, Cooper v Rayner* (1912) 107 LT 457 (contract for supply of coal, delivery of which was to be extended over two years); *Graves v Cohen* (1929) 46 TLR 121 (contract by jockey to ride horses); *J Miller Ltd v Laurence and Bardsley* [1966] 1 Lloyd's Rep 90; *Re Adams* [2004] EWHC 2739 (Admin), (2004) Times, 6 December, [2004] All ER (D) 409 (Nov) (consultancy contract). See also *Borland's Trustee v Steel Bros & Co Ltd* [1901] 1 Ch 279; *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1902] 2 KB 660 at 668-669, CA (affd [1903] AC 414, HL); *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 3 All ER 549, HL.

The benefit of an arbitration clause is assignable: *Shayler v Woolf* [1946] Ch 320, [1946] 2 All ER 54, CA, distinguishing *Cottage Club Estates v Woodside Estates Co (Amersham)* [1928] 2 KB 463. See also *Rumput (Panama) SA and Belzetta Shipping Co SA v Islamic Republic of Iran Shipping Lines, The Leage* [1984] 2 Lloyd's Rep 259; *Montedipe SpA v JTP-RO Jugotanker, The Jordan Nicolov* [1990] 2 Lloyd's Rep 11; *Baytur SA v Finagro Holding SA* [1992] QB 610, [1991] 4 All ER 129, CA; and see PARA 68. Money due under a contract of personal service may be assigned although the contract is not assignable: *Russell & Co Ltd v Austin Fryers* (1909) 25 TLR 414, DC. See also **CONTRACT**. As to building contracts see **BUILDING CONTRACTS, ARCHITECTS, ENGINEERS, VALUERS AND SURVEYORS**.

- 3 *Cooper v Micklefield Coal and Lime Co, Cooper v Rayner* (1912) 107 LT 457.
- 4 *Tolhurst v Associated Portland Cement Manufacturers (1900) Ltd* [1903] AC 414 at 423, HL, per Lord Lindley; *Berlitz School of Languages Ltd v Duchêne* (1903) 6 F 181; *J Miller Ltd v Laurence and Bardsley* [1966] 1 Lloyd's Rep 90. See also *Dawson v Great Northern and City Rly Co* [1905] 1 KB 260 at 272, CA. As to assignment of a lease or an agreement for a lease and specific performance in favour of the assignee see *Crosbie v Tooke* (1833) 1 My & K 431; *Curtis Moffat Ltd v Wheeler* [1929] 2 Ch 224; and **SPECIFIC PERFORMANCE** vol 44(1) (Reissue) PARA 914.
- 5 *Davies v Davies* (1887) 36 ChD 359 at 388, 394, CA.
- 6 *Lynch v Dalzell* (1729) 4 Bro Parl Cas 431, HL; *Sadlers' Co v Badcock* (1743) 2 Atk 554. See **INSURANCE** vol 25 (2003 Reissue) PARA 624.
- 7 *Peters v General Accident Fire and Life Insurance Corp'n Ltd* [1937] 4 All ER 628, 59 Ll L Rep 148; affd [1938] 2 All ER 267, 36 LGR 583 (motor insurance policy could not be assigned); and see **INSURANCE** vol 25 (2003 Reissue) PARA 720.
- 8 *M (Kenya) v Secretary of State for the Home Department* [2008] EWCA Civ 1015, [2008] All ER (D) 66 (Sep).
- 9 *Jenkins v Young Bros Transport Ltd* [2006] EWHC 151 (QB), [2006] 2 All ER 798, [2006] 1 WLR 3189.
- 10 *Nokes v Doncaster Amalgamated Collieries Ltd* [1940] AC 1014, [1940] 2 All ER 549, HL; *Denham v Midland Employers' Mutual Assurance Ltd* [1955] 2 QB 437, [1955] 2 All ER 561, CA.
- 11 See the Transfer of Undertakings (Protection of Employment) Regulations 2006, SI 2006/246; and **EMPLOYMENT** vol 39 (2009) PARA 111 et seq.

Halsbury's Laws of England/CHOSES IN ACTION (VOLUME 13 (2009) 5TH EDITION)/3. CHOSES IN ACTION NOT CAPABLE OF ASSIGNMENT/(4) PARTICULAR CONTRACTS/101. Provision in contract against assignment.

### 101. Provision in contract against assignment.

If there is a provision in a contract prohibiting the assignment of the rights arising under it, it appears that any purported assignment of such rights will be invalid as regards the other party to the contract<sup>1</sup>. It is a question of construction whether a prohibitory provision extends to both the assignment of rights to future performance and the assignment of the fruits of the contract<sup>2</sup>, and whether it prohibits both a legal and an equitable assignment<sup>3</sup>.

In the absence of the clearest words, however, a prohibitory provision cannot operate to invalidate the contract as between the assignor and the assignee and even then it may be ineffective on the grounds of public policy<sup>4</sup>. Moreover, there is no objection to a party to a contract containing non-assignment provisions becoming trustee of the benefit of being the contracting party as well as the benefit of the rights conferred, unless this is also prohibited on the construction of the contract<sup>5</sup>.

A contractual prohibition on assignment without consent may be overridden by a statutory transfer<sup>6</sup>; and a mere contractual provision against assignment of a chose in action does not prevent the appointment by the court of a receiver by way of equitable execution over that chose<sup>7</sup>.

1 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *Yeandle v Wynn Realisations Ltd (in administration) (formerly CJ Pearce & Co Ltd)* (1995) 47 ConLR 1, CA; *Flood v Shand Construction Ltd* (1996) 54 ConLR 125, 81 BLR 31, CA; *Quadmost Ltd v Reprotech (Pebsham) Ltd* [2001] BPIR 349; *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, 76 LGR 735; *Wickham Holdings v Brooke House Motors Ltd* [1967] 1 All ER 117 at 119, [1967] 1 WLR 295 at 299, CA. Cf *Brice v Bannister* (1878) 3 QBD 569 at 581, CA, per Bramwell LJ ('maybe' a stipulation that an assignment should give no right to the assignee would be binding). If the inadequately reported case of *Shaw & Co v Moss Empires Ltd and Bastow* (1908) 25 TLR 190 is construed as a decision to the contrary, it is said by Lord Browne-Wilkinson in *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL to have been wrongly decided. See also *Bawejem Ltd v MC Fabrications Ltd* [1999] 1 All ER (Comm) 377, [1999] 1 BCLC 174, CA (assignee unable to argue that he has any enforceable contractual rights); and see *Re Griffin, Griffin v Griffin* [1899] 1 Ch 408; *Re Westerton, Public Trustee v Gray* [1919] 2 Ch 104; *Barbados Trust Co Ltd v Bank of Zambia* [2007] EWCA Civ 148, [2007] 2 All ER (Comm) 445, [2007] 1 Lloyd's Rep 495. In the case of the assignment of a lease in breach of a covenant not to assign, the assignment is valid, though the lease may be liable to forfeiture: *Williams v Earle* (1868) LR 3 QB 739 at 750 per Blackburn J; and see **LANDLORD AND TENANT** vol 27(1) (2006 Reissue) PARA 564. As to when such a covenant against assignment binds a trustee in bankruptcy see **BANKRUPTCY AND INDIVIDUAL INSOLVENCY** vol 3(2) (2002 Reissue) PARA 414.

Where prior consent is required but not obtained, the assignment will have no legal effect in respect of the non-consenting party but will be effective as between the assignor and assignee: *Hendry v Chartsearch Ltd* (1998) Times, 16 September, [1998] CLC 1382, CA.

2 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85, [1993] 3 All ER 417, HL; *ANC Ltd v Clark Goldring & Page Ltd* [2001] BPIR 568, CA.

3 See *R v Chester and North Wales Legal Aid Area Office (No 12), ex p Floods of Queensferry Ltd* [1998] 1 WLR 1496, [1998] 2 BCLC 436, CA.

4 *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 108, [1993] 3 All ER 417 at 431, HL, per Lord Browne-Wilkinson. See *Shaw & Co v Moss Empires Ltd and Bastow* (1908) 25 TLR 190 at 191 per Darling J; *Spellman v Spellman* [1961] 2 All ER 498 at 503, [1961] 1 WLR 921 at 928, CA, per Willmer LJ (but cf at 501 and 925 per Dankwerts LJ). See also *Re Turcan* (1888) 40 ChD 5, CA (as a matter of construction only assignment at law prohibited, assignment by declaration of trust held good); *Helstan Securities Ltd v Hertfordshire County Council* [1978] 3 All ER 262, 76 LGR 735. Cf *Brunton v Electrical Engineering Corp'n* [1892] 1 Ch 434; *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700, CA; *Robson v Smith* [1895] 2 Ch 118.

5 *Re Turcan* (1888) 40 ChD 5, CA; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85 at 104, [1993] 3 All ER 417 at 428, HL, per Lord Browne-Wilkinson; *Don King Productions Inc v Warren* [1998] 2 All ER 608, [1998] 2 Lloyd's Rep 176 (affd [2000] Ch 291, [1999] 2 All ER 218, CA).

6 *Co-operative Group (CWS) Ltd v Stansell Ltd* [2006] EWCA Civ 538, [2006] 1 WLR 1704, [2006] 2 BCLC 599 (transfer under the Industrial and Provident Societies Act 1965 s 51(1)). As to statutory transfers see PARAS 86-88.

7 *Masri v Consolidated Contractors International UK Ltd (No 2)* [2007] EWHC 3010 (Comm), [2008] 1 All ER (Comm) 305, [2007] All ER (D) 356 (Dec). As to receivers by way of equitable execution see **CIVIL PROCEDURE** vol 12 (2009) PARA 1497 et seq.

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Print Request: Selected Items in Table of Contents: (101)

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